

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

160

77-7037

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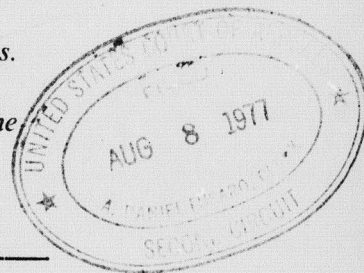
In The
United States Court of Appeals
For The Second Circuit

NATIONAL AUTO BROKERS CORP., et al.,
Plaintiffs-Appellants,

-against-

GENERAL MOTORS CORPORATION, et al.,
Defendants-Appellees.

*On Appeal from the United States District Court for the
Southern District of New York.*



BRIEF FOR PLAINTIFFS-APPELLANTS

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 77-7037

NATIONAL AUTO BROKERS CORP., FRANK MAIORANA, ANTHONY MAIORANA,
GENERAL AUTO SALES & LEASING, INC., DALE STRIMPLE; RALPH ATIELLO,
AS ADMINISTRATOR OF THE ESTATE OF E. LOUIS JAMELE, DECEASED;
NABCOR OF EAST NEW YORK, INC. and ALFRED J. YOUNG, SR. d/b/a
A. J. YOUNG, SR. AUTO SALES,

Plaintiffs-Appellants,

-against-

GENERAL MOTORS CORPORATION, FREDERIC G. DONNER, JAMES M. ROCHE,
BOB BAIN CHEVROLET, PAUL BATT BUICK, INC., GLEN CAMPBELL
CHEVROLET, INC., HAMISTER-GILLOGLY CHEVROLET, INC., PARAGON
OLDSMOBILE, INC., NIAGARA FRONTIER AUTOMOBILE DEALERS ASSOCIATION,
INC. and GENERAL MOTORS ACCEPTANCE CORPORATION,

Defendants-Appellees.

PLAINTIFFS-APPELLANTS' BRIEF

STATEMENT OF THE ISSUES PRESENTED

1. Did plaintiffs have a prima facie case of illegal vertical restraint under § 1 of the Sherman Act as to GM's "whitelist" of approved fleet customers for GM's dealers and as to GM's method of allocating cars?
2. Did plaintiffs have a prima facie case of illegal group boycott ("blacklist") and illegal whitelist under § 1 of the Sherman Act as part of a horizontal agreement to allocate customers and territories and fix retail prices?

3. Did plaintiffs have a prima facie case as to damages?
4. Should plaintiffs have been given answers to their "Communications Interrogatories" concerning contacts by GM-GMAC officials about Nabcor?
5. Was it an error for Judge Griesa to deny plaintiffs' motions for a mistrial and recusal made under 28 U.S.C. § 455 and by the filing of an affidavit under 28 U.S.C. § 144 based upon a substantial showing of actual bias and on Judge Griesa's prior representation of defendant GM without disclosure of this to plaintiffs.

PRELIMINARY STATEMENT

This is an appeal from a judgment by Hon. Thomas P. Griesa of the Southern District of New York granting a directed verdict against plaintiffs under Rule 50(a), F.R.Civ.P. and dismissing plaintiffs' case. The supporting bench opinion of Judge Griesa was published at OCH Tr. Rep. ¶ 61,211.

STATEMENT OF THE CASE

NATURE OF THE CASE

This action under §§ 1-3 of the Sherman Act was commenced on December 10, 1970. Plaintiff Frank Maiorana ("FM"), founder and principal shareholder of plaintiff National Auto Brokers Corp. ("Nabcor") formulated the business a few months before defendant General Motors Corporation ("GM") was perpetually enjoined, on 8/18/66, from interfering with discount sales of Chevrolets by discount houses and others anywhere in the United States (E-295), following the Supreme Court's decision in United States v. General Motors, 384 U.S. 127 (1966). To assist the Court in understanding this complex case, a 3-1/2 page summary of the case follows:

SUMMARY OF THE CASE

Nabcor, a licensed new-car dealer not franchised by GM, sold Nabcor franchises to 146 persons to act under a power of attorney as purchasing agents for retail customers solicited by the brokers to purchase, from Nabcor, any make or model of domestic car. The typical Nabcor customer paid several hundred dollars less than the average price other persons paid to factory dealers. Nabcor ordered the cars from dealers willing to sell to Nabcor, at a low markup of \$25 to \$50, usually, and the dealers ordered the cars from the factory.

Some GM dealers refused at the outset to have any dealings with Nabcor, and other GM dealers accepted orders from Nabcor and placed them with GM, but many of them refused subsequently to deliver the ordered cars to Nabcor; extended delivery delays to Nabcor caused Nabcor's customers to cancel their orders; and Nabcor lost car orders, sales and brokers. A series of refusals by GM dealers to deliver cars ordered through them by Nabcor during late 1966 stopped Nabcor's rapidly-expanding business, and during early 1967 forced a drastic curtailment of Nabcor's operations followed by years of continuous efforts to save Nabcor's financially crippled business through legislative, administrative, executive and judicial remedies. Nabcor gave up (other than through this action) in early 1973, immediately after and because of the District Court's denial of Nabcor's motion for a preliminary injunction prohibiting continued interference by GM with Nabcor's automobile brokerage business.

This action is the first part of the four actions into which the original action has been severed. This first part is against 10 defendants: GM, General Motors Acceptance Corporation ("GMAC"), GM President Roche, GM Board Chairman Donner, 3 Buffalo Chevrolet dealers (Bain, Campbell and Clements-Gillogly), Paragon Oldsmobile (N.Y.C.), Batt Buick (Buffalo)

and the Buffalo Automobile Dealers Association ("BADA"). This part "A" was tried over a period of 33 trial days starting October 6, 1976 with a 7-day evidentiary hearing on the admissibility of plaintiffs' proposed hearsay testimony and then on October 20, 1976 with a 22-day trial before a jury, ending November 29, 1976. After 4-5 days of argument by counsel on defendants' motions for a directed verdict, ending on December 6, 1976, the District Court granted the motions and dismissed all of the "A" action, stating in its bench opinion that there was insufficient evidence as to liability or damages as to any of the 8 plaintiffs. GM was not required by the court to present any proof as to the reasonableness of any of the various restraints imposed by GM on its dealers and on resellers such as Nabcor, or to explain why 50% of Nabcor's fulfilled car orders were delivered on a substantially-delayed basis.

The District Court's bench opinion did suggest (A-6378-9), however, that plaintiffs had made out a prima facie case on plaintiffs' "whitelist" issue: that GM maintained a list of approved wholesale customers ("Qualified Fleet Purchasers") to whom GM dealers could sell any number of new cars (from a single car up to tens of thousands) at "fleet prices" of about \$25 to \$50 per car over the dealers' purchase price from GM, and that GM dealers believed they were not allowed to sell cars to Nabcor unless Nabcor had, or qualified for, a GM "fleet certificate", for which Nabcor was repeatedly turned down by GM.

The cars ordered by GM dealers for approved fleet customers were delivered by GM out of the "fleet allotment" set aside by GM out of total GM car production to fill sales by GM dealers to the GM-approved "fleet" or wholesale customers (such as Hertz, Avis and AT&T). These GM-approved wholesale customers had to be registered owners and users in their business of 10 or more cars of any make or model who did not

resell the cars for a period of at least 6 months). Any such customer could buy as little as 1 GM car and qualify for the fleet allotment.

GM dealers were not limited in the number of cars they could sell to GM-approved wholesale customers out of the fleet allotment for Chevrolets, Pontiacs, Oldsmobiles and Buicks. But, at the same time, the GM dealers were limited in the number of cars they could sell to persons other than the GM-approved wholesale customers.

Naboor, as a reseller of cars, did not qualify to buy cars at wholesale prices under GM's fleet allotment practices and, as a result, any sales by GM dealers to Naboor had to come out of the GM dealers' "retail allotment", even though the GM dealer requested that the car be made available out of the fleet allotment. Each GM dealer was artificially limited by GM to a certain number of cars each month for retail resale, with excess orders by the GM dealer being refused by GM. GM did not offer proof on the reasonableness of its policy of creating shortages in one part of the GM dealer's business simultaneously with non-shortages in the business of servicing the GM-approved wholesale purchasers.

Naboor could not maintain long-range relationships with GM dealers as to any significant volume of cars because no dealer could afford to sell to Naboor all or any significant part of the dealer's retail allotment at the \$25 to \$50 fleet price.

Plaintiffs claimed that the defendants and numerous identified co-conspirators entered into a contract, combination and conspiracy in unreasonable restraint of trade to prevent Naboor and plaintiff General Auto Sales & Leasing, Inc. ("General") from obtaining cars for Naboor's franchisees from willing GM dealers. When GM's whitelists for wholesale sales did not prevent some of its dealers from selling to Naboor, GM

employees took overt action to stop and/or interfere with sales to Nabcor, resulting in a blacklist or group boycott and extended delivery delays. The GM restraints are part of a horizontal agreement to boycott plaintiffs, to preserve territorial exclusives, allocate customers and fix prices.

Plaintiffs adduced substantial proof that GM together with its dealers employed various restraints, including restrictions upon resale, warranty restrictions adversely affecting Nabcor's customers, territorial restrictions upon resales, and customer and market allocations, to (i) create and maintain illegal territorial exclusives for the GM dealers; (ii) fix prices for retail customers for GM cars at artificially high levels; and (iii) to drive non-franchised discounters such as Nabcor and its automobile brokers out of business.

Prior to the trial, plaintiffs' attorney knew that Messrs. Davis Polk & Wardwell had represented GM in major antitrust litigation more than 23 years ago (A-5601-2). During the trial, plaintiffs' attorney found out that Judge Griesa and Davis Polk & Wardwell, his former law firm, had represented GM immediately before and at the time Judge Griesa was appointed to the bench and assigned this action for all purposes; also, Davis Polk & Wardwell represented GM during the Nabcor action in a suit by a GM Chevrolet-Oldsmobile-Cadillac dealer under the Automobile Dealer Franchise Act at the time that plaintiffs were attempting to establish a class of GM dealers to be represented by plaintiffs. Judge Griesa denied the class-action motion (see opinion dated April 5, 1974 - A-1031 et seq.). Judge Griesa denied motions by plaintiffs to have him declare a mistrial and recuse himself, made orally during trial and by the filing of an affidavit of prejudice under 28 U.S.C. § 144.

COURSE OF PROCEEDINGS BELOW

None of the defendants moved during pre-trial for summary judgment on the plaintiffs' claims of conspiracy, group boycott, price-fixing and related territorial and customer restraints except defendants Donner, Roche and Paul Batt Buick, which motions were denied.

STATEMENT OF FACTS

A. GM'S DISTRIBUTION SYSTEM

1. GM Dealer System.

GM distributes its cars through a system of dealers (A-4413), most franchised and about 15-18 unincorporated divisions of GM (A-4410), including Midtown Chevrolet-Pontiac (A-2949, E-34), GM's only dealer division selling Chevrolets (A-4410); and Cadillac Division (A-2968-9) at Broadway and 57th Street in New York, N.Y.; and some financed by GM's Motors Holding Division, such as defendant Bob Bain Chevrolet (A-4411-2 but not admitted; instead, the court wanted plaintiffs to obtain a stipulation concerning GM's financing of Bob Bain Chevrolet, even though the attorneys for 6 of the 10 defendants, including Bob Bain Chevrolet, were not in attendance at the trial except for a day or so. Hereinafter, the different types of GM dealers described above shall be collectively referred to as "GM dealers". GM dealers order new cars from GM's factories according to specifications set forth by the GM dealer on the GM "Wholesale Order Form" (E-22). The GM dealer indicates to his GM "Zone" for his type of car, part of GM's factory network (1052), whether the car is (i) for resale to a retail customer (a "sold" order); (ii) for the dealer's own stock or inventory (a "stock" order); or for (iii) sale to a fleet customer (a "fleet" order) (E-17, 19, 22; A-3369).

The GM dealer pays the same price for a given type of car regardless of the number of cars it orders and whether the order is marked sold,

stock or fleet (A-5630). The cars are made the same whether they are ordered sold, stock or fleet (A-5237). The name of Nabcor or any qualified fleet customer of the GM dealer is identified in the order to the GM factory (E-19; E-1353-6; A-3438; A-5264), unless the order is falsely submitted as a "stock" or possibly "retail" order, to avoid GM detection of the customer's identity (A-5071-2).

Each GM dealer is told prior to the beginning of some or all calendar months the maximum number of cars it may order from GM during the month for its customers other than GM-approved fleet accounts (E-57). This maximum number is known as the dealer's "retail allotment" from GM (E-20, 57). At times, the dealer is not limited by the retail allotment, and it can order additional cars from the factory (A-5625). At other times, particularly during the first few months of each new model year or as to limited production models such as Cadillacs and Corvettes, the dealer's retail allotment is a limitation on the number of cars the GM dealer can sell to its customers during the forthcoming month (A-3437-8, 3568, 4234-6, 4342, 4373, 5257). Rather than building cars on a first-ordered, first-built basis, GM rejects orders in excess of the dealer's retail allotment (E-57), which artificially and unnecessarily creates a shortage of cars which can be ordered from GM by GM dealers over short (1-month) periods of time.

When GM is not willing to accept all orders which its dealers can generate during the short (1-month) period or longer, the GM dealers are forced into maximizing their price on the cars they do get for their non-fleet customers (A-4256, 4275). The dealers do this to meet their high overhead expenses and maximize their profits out of the gross profits from the sale of the limited number of cars available for sale to non-fleet customers (A-4275). The dealer puts orders for Nabcor at the bottom of the pile, to wait until cars can be ordered without limitation (A-4276) or the substantial

delays are caused by GM (A-3553-4). Available retail allotments are sold at higher retail prices during the shortage created by GM (A-4256).

If, on the other hand, the dealer sells any number of cars to wholesale ("fleet") customers approved by GM, GM gives the dealer all the cars it needs to make the sale, over and above the GM dealer's limited retail allotment (A-3374). Thus, the GM dealer is able to sell \$5,000 cars to GM-approved wholesale customers at very low markups, less than 1%, perhaps \$25 per car (E-184) (a sale by GM for all practical purposes at substantially the price fixed by GM, amounting to price-fixing in a sense because of GM's use of its independent dealers to make the sale to GM's approved customers), without any loss of gross profits the GM dealer can make by selling his limited number of retail-allotment cars at substantially higher retail prices, involving markups of about \$362-462 (A-3349). The effect is that GM's fleet-allotment system prevents its dealers from making desired sales to Nabcor at wholesale (as distinguished from retail) prices solely because Nabcor is not a wholesale customer approved by GM. (As will be seen, even retail sales to Nabcor have been cut off; plaintiffs' "blacklist" claims, for the most part.) See "V. 'Fleet Sales' are Sales by GM which Bypass GM's Dealers" in plaintiffs' pretrial brief (A-2091-3) for a further discussion.

To be an approved wholesale or fleet customer, a company must be issued, or qualified to receive, a GM fleet certificate (A-4064 - one of many instances in the record where this is proven). To qualify, the company must have at least 10-20 cars of any make or model registered in its name and used in its business (such as a fleet of company cars for its salesmen), leased (a leasing company) or put out on daily rental (a rental-car company) (E-334, 1099-2000; A-3436-7, 4351-3). The user, leasing or rental-car company, to be a qualified fleet account with GM, must not resell the cars within 6 months of purchase (A-4064, E-1100), the same restriction which

existed in earlier years under the old "fleet agreement" between GM and the dealers' customers, according to the NY ADA letter found in GM's files and admitted for background purposes (E-6). See "Y. History of GM Restraints upon Resales" in plaintiffs pretrial brief (A-2094-6 and "GM's Fleet Sales Program is an Illegal Restraint Per Se" in part (A-2024-2053).

Inasmuch as Naboor resold the new cars on the same day it took title from the GM dealer, Naboor could not be a qualified fleet account (or included in GM's "whitelist") under GM's rules (E-36, 64; A-4064), and GM dealers could not get extra cars from GM to replace any part of their retail allotment sold to Naboor (A-3437-8).

Starting with the 1967 model year, GM offered \$50 rebates to dealers who sold cars to GM-approved fleet accounts (A-3054-7). During the 1967 model year, the fleet account had to have at least 20 cars registered in its name and used in its business (the same requirement for obtaining a fleet certificate), and for the 1968-1970 model years, the requirement for the fleet rebate was dropped to 10 cars registered and used by the fleet account (A-3053-66). Qualification for the fleet allotment, as stated above, coincides with GM's definition of qualified fleet purchaser under the various fleet rebate plans of GM.

Determination by GM of whether a given company had the requisite number of cars registered in its name was made by looking at the automobile registration statistics compiled by R. L. Polk Co. (A-3064), which GM summarized in part (E-333-536) and distributed to its dealers for them to ascertain who met the minimum requirements of GM to become qualified wholesale purchasers (E-333-334). Sales to Naboor did not qualify for the fleet rebate and Naboor even advised GM during 12/67 that Naboor did not seek any rebates and that Naboor was satisfied with the prices Naboor was obtaining from GM dealers (E-37, A-4065).

GM knew that GM dealers believed that their customers who purchased as GM-approved fleet accounts could do so only by agreeing not to resell the purchased cars for a 6-month period (E-6, 56). This agreement was commonly known as a "fleet agreement (E-6)", and was a term used, during 1966-70, by GM's highest fleet officials and various GM dealers interchangeably with the GM term "fleet certificate" (E-6, 61, 92). The New York Automobile Dealers Association ("NY ADA") executive director, Peter Gordon, thought that Nabcor was not able to buy cars for resale during 1966-67 because of these restrictions in what he thought were the GM Fleet Agreements (E-6). GM received a copy of this letter to the NY ADA's directors and past presidents, dated 10/21/66 (E-6).

The GM Fleet and Governmental Sales Section (the "Fleet Section") located in Detroit (E-333) has the sole responsibility for issuing GM fleet certificates, and only the Director of the Fleet Section has the authority to sign the certificate (A-5670-1), which is then used by purchasers of any type of GM car. See E-972-5 for a copy of the 1968 GM fleet user certificate, signed by witness Olson, Director of the Fleet Section. The Fleet Section has various Regional Offices throughout the United States, including one in Philadelphia (covering Buffalo) and one in New York (E-37, 44). Officials of the Regional Office of the Fleet Section prepare the applications for fleet certificates which are submitted to the Fleet Section in Detroit for processing (E-49-52, 64, 65). A Dun and Bradstreet report on an applicant is required before any fleet certificate will be issued (E-66, A-5677).

As will be discussed at length later, GM dealers believe that a GM fleet certificate is required for them to deal with Nabcor, and various GM dealers submitted fleet certificate applications to GM on behalf of Nabcor, but in each case the fleet certificate application was denied by GM.

The following exhibits (listed by their page numbers in the 4 Exhibits volumes) are plaintiffs' documentary evidence that GM would not

permit GM dealers to order cars for Nabcor out of any fleet allotment, because Nabcor was not a GM-approved fleet account, and instead required that the GM dealers make any sales out of their limited retail allotment of cars (which plaintiffs claim was an artificial limitation imposed on the GM dealers by GM to prevent them from selling cars to resellers such as Nabcor): E-2-3, 6-7, 9, 16-23, 26, 31, 33-34, 37, 43, 46-53, 57-61, 65-67, 79-82, 84-85, 90-92, 181 (not admitted into evidence), 333-536 (GM's "National Account List" - a published "whitelist"), 538-9, 638, 809, 811-812, 814, 830-832, 836-841, 854-857, 972-975, 1097-1116, 1323, 1353-1368. GM claims that GM dealers were free to sell to Nabcor without any restrictions, even out of the GM fleet allotment (A-5664-5, 5668-9) although a few seconds later the witness proved the "whitelist" argument (A-5669, lines 12-20) by saying that GM fleet plans for 1967 or 1968 would have prohibited a Chevrolet dealer from selling 200 cars to Nabcor out of the GM fleet allotment. Roche testified a dealer could sell to anybody out of the fleet allotment (A-4420) and Donner testified similarly, that there were no GM policies interfering with or preventing Nabcor from reselling new GM cars (A-4428). Donner even claimed he was unaware of the fleet allotment (A-4423).

Some of the testimony and documents proving the existence of the illegal whitelist is reviewed by plaintiffs' counsel during the 4-5 days of argument on defendants' motions for a directed verdict, at A-3924-4020, 4021-4078, 4088-4090 and 4119-4123. In the appendix citations immediately following, "L" is followed by one or more numbers indicating the line(s) of the indicated page of testimony. Testimony by GM dealers and a GM official proving the whitelist claim is found at: A-3280L16-21,24, 3281L13, 3306L24, 3307L16, 3309L13, 3310L14, 3311L20, 3312L2, 3313L5, 3314L15, 3331L6,16,17,23, 3332L14,15,19, 3348L14-787L2 (Dillon of Ruckle Pontiac); A-3359L15, 3360L9, 3375L17, 3376L3, 3377L14-3378L12, 3383L14-3386L22, 3398L9, 3399L1-3402L13,

3406L18, 3414L3, 3421L6, 3423L1, 3424-3431, 3436L4, 18, 23, 3437L17, 3438L2, 5, 14, 3440L7, 20, 3441L8, 3442L6, 3449L20, 3466L23, 3468L15, 3477L1, 3480L16, 3491L21, 3493L7, 3494L21 (Stewart of Ruckle Pontiac); A-3532L3-8, 3534L15-25, 3548L11 (Madden of Rohrer Chevrolet); A-4204-4207, 4220L17, 4237L25, 4261, 4267 (Murray of Colonial Cadillac); A-4342L17-24, 4343L4-21, 4352L23-4353L2, 4368, 4369L17, 25, 4370L3, 13, 4373L11-13, 22-24, 4374L20-4375L20 (Urso of Bano Buick); A-5228-5229, 5234L25-5235L4, 5236L19-21, 5238L18-5239L4, 5623L11-5631L4 (Rock of GM Fleet Section); A-5632-5644 (Berg of GM Fleet Section); A-5653-5683 (Olson of GM Fleet Section); and A-5711L25-5716L13 (Karney of GM Fleet Section). Also, the testimony of plaintiffs and their witnesses discussed throughout the remainder of this brief should be considered on the whitelist issue.

2. GM Warranty Program

Persons who bought new GM cars from Nabcor were not entitled to the full life and other benefits of the GM warranty enjoyed by persons who bought directly from GM dealers (A-2100-9, 5770, 5779-80). Nabcor's customers were treated by GM as "second" retail purchasers, with Nabcor being the first retail purchaser from the GM dealer, and the warranty commenced running upon the sale to Nabcor. Nabcor's customer was required to pay a \$25 fee to obtain a new warranty for the unexpired portion of the original warranty to Nabcor. The District Court held that the warranty was not a per se restraint (A-5764, 5775).

3. GM Evaluation of Dealers' Performance

GM employs a system of evaluation of performance of its dealers which reduces the dealer's retail allotment in subsequent years in proportion to the number of new cars the dealer sells outside of the dealer's own area of sales responsibility (A-4244-52). The analysis is made by GM of the number of new Cadillacs, say, registered as new cars in the area surrounding

one of its Cadillac dealers. If the Cadillac dealer made sales to Naboor, the cars would appear as new Cadillac registrations in other areas of responsibility, which would reduce the Cadillac dealer's performance rating, and result in a reduction of the number of cars he would have in his retail allotment for the same month during subsequent years. This same adverse rating did not result from sales made by the dealer out of the fleet allotment. Those sales could be made for delivery and first registration to any part of the country, with no penalty to the dealer. As a consequence of this evaluation program, Colonial Cadillac hid title with respect to the cars it sold to Naboor, by registering the cars first in the name of Mercer Leasing, Inc., a subsidiary of Colonial Cadillac, and by having Mercer Leasing transfer title to Naboor (A-4244-8). In this way, the Cadillac sold to Naboor was first registered in Colonial's area of sales responsibility, even though it would also be "first registered" in some other Cadillac dealer's area of sales responsibility.

4. Other Aspects to GM's Distribution Program

Judge Griesa would not permit witness William Kemp of Kemp Cadillac-Pontiac (Berlin, Connecticut) or Kemp's former fleet sales manager to testify. As plaintiffs' pretrial brief disclosed, Kemp and Kelleher would have testified (A-1968-1981), as they did in their respective affidavits used in support of plaintiffs' preliminary injunction motion (A-287; A-306) which were un rebutted by defendants, that their GM District Manager, Lyle Blossom, told them not to advertise Cadillacs for sale outside of their own area of sales responsibility. Also, Kemp would have testified that GM refused to let Kemp make fleet sales to certain accounts which met GM's fleet requirements, and that GM interfered with a fleet transaction Kemp was concluding with a major GM-approved fleet account, by advising the customer from which Pontiac dealer it could obtain a lower fleet price. This evidence supports the conclusion

that GM is improperly interfering with the fleet market and is treating the market as its own preserve, irrespective of the interests of the GM dealers through which GM runs the paperwork for the sales for an insignificant part (often less than 1%) of the sales price. Judge Griesa refused to allow their testimony because of a 1974 witness list of plaintiffs (no defendant submitted any list even for the trial) which did not include their names (because of the Court's refusal to consider their affidavits during the 1973 preliminary injunction motion). Yet, the Court permitted plaintiffs to call other dealers. GM's counsel said Kemp was in litigation with GM; but Kelleher was not; his affidavit revealed no present connection with Kemp or any dealer or manufacturer (A-3749-50).

B. GM'S INITIAL RESPONSE TO NABCOR

Prior to 1966, FM was manager and owner of various franchised car dealerships (E-1289) and Autocrest Leasing, Inc. (E-1289), which had a GM fleet certificate (E-2-3). During 3/66, one month after Nabcor sold its first franchise (E-1240), Colonial agreed to order 85-90 Cadillacs for Nabcor (E-3). On 4/11/66, Colonial requested GM's Cadillac Zone to make a fleet allotment available to Nabcor for the 85-90 Cadillacs (E-2), transmitting a copy of Nabcor's letter request in which the Autocrest fleet certificate number was set forth (E-2).

GM did not give Nabcor any fleet allotment (A-4206), and Nabcor's request never reached the Fleet Section in Detroit (E-9). Meanwhile, on 5/2/66 (E-27), Colonial sold and delivered 1 Cadillac to Nabcor, a 1966 car built prior to Nabcor's order and located by Colonial at another Cadillac dealer (NIA-1899 - Note: "NIA" means Not in Appendix). Title went from Colonial, to Colonial's Mercer Leasing subsidiary (the first retail purchaser), and then to Nabcor (E-27-8; NIA-1898), making Nabcor the second

retail purchaser and Nabcor's customer the third retail purchaser, according to Donner and Roche (A-4404, 4429).

Meanwhile Nabcor continued to sell automobile brokerage franchises for persons to sell any make and model of car. Between February and June, 1966, Nabcor had sold 15 franchises (E-630-1), and Nabcor was operating from 2 places of business: Jenkintown, Pennsylvania and Yonkers, New York (NIA-110).

On 6/6/66, Nabcor ran a classified ad in The New York Times to sell Nabcor franchises (E-33) and on 6/7/66 a reader contacted a Mr. Wetzel of GM's Public Relations Staff in New York City. The reader said Nabcor told him Nabcor would fill any new-car orders for lease or purchase and that Nabcor purchased the cars at special fleet prices, to which Nabcor added a \$50 fee (E-33). Wetzel transmitted this information to his superior in the GM Public Relations Department who transmitted it on the same day to defendant Donner, GM Board Chairman, who received it on the same day (E-32). Also, various other GM officials got copies of PX-288 (E-33). See E-84.

From 1959 to 1967, Donner was the highest official of GM (A-4422, 4424; NIA-2087), to whom GM President Roche reported (NIA-2087). Although Donner read the injunction against GM in the California Discount case (A-4423-4), he claims he doesn't know who in GM was responsible for its enforcement (A-4424) and that he never inquired about compliance with the judgment (A-4425), because he did not consider it necessary (A-4425). GM's compliance program was to advise GM's field personnel about the judgment, according to Donner (A-4431). Nothing was said about any review of GM's distribution practices, past or newly adopted.

Donner forwarded P-X 288 (E-33) to Roche because the GM Distribution Staff (i.e., marketing staff) was under his jurisdiction (A-4427). Donner said the Nabcor ad should have been of interest to the Distribution Staff because Nabcor claimed it was acting as an independent wholesaler (i.e.,

"distributor") of GM cars and GM had no such independent wholesalers at that time (A-4427). Donner claimed he was sensitive to antitrust considerations (A-4428), but not concerned with any antitrust implications regarding GM's relationship with Nabcor, a company reselling GM cars (A-4428). Donner claimed he knew of no GM policies which would prevent Nabcor from selling or leasing new GM cars (A-4428), except that, under GM's warranty, Nabcor would be considered the first retail purchaser (A-4429).

Donner immediately forwarded P-X 288 (E-33) to Roche for his information (A-4426), who received it on 6/9/66 (PX-288, E-33). Roche indirectly supervised the GM Fleet Section (2051). Mr. Crawford, Vice President in Charge of the GM Distribution Staff, had immediate responsibility for the Fleet Section (A-4390), and Mr. Feely was a member of the GM Distribution Staff (A-4390).

Roche read (§ 4-b on p. 4 of) the injunction against GM shortly after it was issued (A-4391), on 8/18/66 (E-295-305), and the Fleet Section would have known about it in the ordinary course of GM's business, according to Roche (A-4393). Roche testified there was no one person responsible for compliance with the judgment (A-4394).

Roche said he believed the Nabcor ad was significant because it was an offer by a person other than GM of franchises to sell GM cars, something he had never seen before (A-4402, 4409), and that Roche did not believe anyone but GM had the right to sell such franchises (A-4402). Roche said that whether Nabcor was selling new cars or not would depend on how the title was transferred from the GM dealer (A-4404); if Nabcor took title, and then resold the car to Nabcor's customer (which was the Nabcor system), Nabcor would be the first retail purchaser and Nabcor's customer would be buying a used car and would not get the full benefits of GM's warranty (A-4404). Of interest to Roche was that Nabcor was advertising territories for

the distribution of GM, Ford, Chrysler and American Motors automobiles (A-4408). Roche knew that the GM cars being sold by Naboor would have to come from GM (A-4409). Roche said he knew of no other company offering franchises to sell GM cars (A-4409-10), and that GM was capable of doing that itself (A-4409-10).

Roche testified "insofar as Naboor was concerned, we didn't feel that they had any right whatsoever to offer to sell a GM franchise or anybody else" (A-4413), apparently referring to the other automobile manufacturers. Roche said that to understand this, a person must fully understand the GM franchise system (A-4413-4), for instance that Naboor could not service the GM car, that Naboor did not carry a full stock of parts, and that Naboor was not engaged in business at a particular location to serve the interests of the purchasers in that area (A-4414). Roche also admitted that to the extent Naboor took away business from the GM dealers, Naboor could interfere with the ability of GM to deliver the full range of products and services GM was offering (A-4414). Not only was Naboor competing with GM as a franchisor, Naboor was competing with GM which at the time had 15 to 18 dealer divisions selling GM cars at retail, according to Roche (A-4410).

Roche testified he referred the Wetzel memo and Naboor ad (P-X 288, E-33) to Crawford of the GM Distribution Staff (A-4400-1). The Distribution Staff or Roche referred the Naboor matter to GM's general counsel (E-31) who sent the Naboor file to Crawford (E-31), who ordered an investigation of Naboor, directly or through his subordinate Sales Section (E-31, 84).

During 6/7 to 6/14/66 (E-33, 83), the Sales Section requested the Chevrolet Division (E-84-5) to investigate Naboor, as a result of the Naboor ad. The investigation report of 6/14/67 by Foley to O'Connor, both of the GM Sales Section (E-83), said that Naboor purchases Fords for \$15 to \$20 over dealer invoice; that the cars are easy for Naboor to buy with many Ford

dealers participating; that Nabcor had acquired 3 Chevrolets at \$90 over dealer invoice; that Nabcor which started with \$35,000 in capital is reported to be in financial difficulty; that Nabcor's main operations are in New York City; that Foley, if requested by O'Connor, would have a GM representative contact Nabcor without divulging he is employed by GM (E-83).

At Crawford's request, Feely submitted the Chevrolet investigation results to Crawford, by letter of 6/17/66 (E-31); and on or before 6/20/66 Crawford told Feely that they were requested to give Roche a complete report on Nabcor (E-32). On 6/22/66, Feely directed that O'Connor handle Crawford's request to give Roche a complete report on Nabcor (E-32).

O'Connor spoke with Wetzel concerning P-X 288 and was told that, in response to the reader's inquiry whether GM was aware of the arrangements which Nabcor claimed it had with GM dealers, Wetzel had advised the inquiring New York Times reader that GM's method of distribution was through GM dealers only (E-9). On the same day, 6/24/66, O'Connor communicated with the GM Fleet Section about Nabcor, and was told that the records of the Fleet Section revealed no fleet certificate issued to Nabcor and no communications with, or requests for a fleet certificate from, Nabcor (E-9).

On 6/27/66, Foley (E-86) received a complaint about Nabcor and its franchisees from a Pontiac dealer in Newburgh, New York which said that the dealers in the Newburgh Automobile Dealers Association "are up in arms" about "these parasites". The dealer enclosed a 3/17/66 D&B report on Nabcor saying Nabcor had 4 franchisees already; that Nabcor planned to have 50 by the end of its first year and 500 by the end of 3 years; that Nabcor's plans call for selling from Maine to Florida and East of the Mississippi River; that Nabcor will become a national organization; and that Nabcor has made contracts with several dealerships to obtain warranty service (E-87-9).

On 6/29/66, O'Connor wrote another memorandum repeating the information about Nabcor in E-83/PX-400 (E-84-5), then on 7/1/66 Crawford of the Distribution Staff suggested that O'Connor forward to Roche the information he developed about Nabcor, which O'Connor did, on 7/1/66, which was received by Roche on 7/1/66 with copies of the information on Nabcor (E-30).

On 8/18/66, the final judgment was entered against GM in the California Discount case, which enjoined GM perpetually and nationwide from interfering with discount houses, referral plans and others who were engaged in the sale of new Chevrolets without a factory franchise (E-295-305).

On 9/22/66, GM was asked by a prospective Nabcor franchisee whether Nabcor can deliver GM cars at discount prices (E-24). The question was referred by O'Connor to GM's general counsel (E-24). A GM attorney replied, misleadingly, by telling the inquirer that GM sells its cars only to authorized GM dealers and, falsely, by stating that GM has no knowledge concerning Nabcor. A carbon copy was sent to O'Connor (E-25).

On or before 12/14/66, one Oldsmobile official told another that Nabcor will furnish new cars to Nabcor's brokers at \$50 over dealer cost; that Nabcor claims it can do this because it has fleet certificates from all car manufacturers; and that the California judgment against GM made this legal for Nabcor. Also, the Oldsmobile official stated that Nabcor is buying cars for dealer cost, and that the GM Oldsmobile dealers in Michigan are quite upset about this (E-16). This information was communicated to Karney, New York Regional Director of the Fleet Section, who ultimately wrote to Nabcor advising Nabcor that GM would not issue a fleet certificate to Nabcor (E-16, E-65), which occurred in 1968.

By 12/14/66, Nabcor had sold about 50 franchises (E-1240; E-629-38), had 50-60 employees in its 3 offices, including a new office in the GM Building in New York City, had already sold and delivered about 41 new cars,

including 34 GM cars, and had 70 GM cars still on order (PX 450, E-93-98), including 16 Chevrolets, 40 Cadillacs, 2 Oldsmobiles, 6 Pontiacs and 6 Buicks under agreements with 11 GM dealers. Prior to 12/14/66, various GM dealers refused to accept any orders from Nabcor and some of these GM dealers (as well as defendant Paragon Oldsmobile) refused to deliver cars to Nabcor after accepting orders from Nabcor, as will be explained at length later.

C. NABCOR'S INITIAL DEALINGS WITH GM DEALERS

Prior to 12/12/66, when GM took over Don Allen Chevrolet in New York City (A-2951-2) and refused to deliver 11 cars (A-2938-47) ordered by Nabcor (A-2953-4), Nabcor ordered cars from about 12 GM dealers (E-94-8). Nabcor wanted to establish and maintain 1 or 2 sources for each of the 5 GM makes of cars, to concentrate Nabcor's purchases (A-4093-4).

Cadillacs: After Colonial sold the "locate" to Nabcor in 4/66 (NIA-1898), Colonial Cadillac accepted 38 orders from Nabcor for 1967 Cadillacs (E-1422), from 9/5/66 to 12/12/66, but none of these cars was ever delivered or sold to Nabcor (A-5439, 5512-3; E-94-8). During mid-December, 1966, Colonial's president offered Nabcor 2 Cadillacs in stock (including one ordered for his wife) to ease the pressures Nabcor was getting from its brokers about the non-deliveries (A-5435-6, 5561-3). Some of the Nabcor orders with Colonial already had been cancelled by various Nabcor brokers (e.g., E-94 lines 29, 30, 33; A-5437-8). Colonial applied to GM for a fleet allotment for Nabcor (E-2-3), but Nabcor did not get an allotment (A-4421-2). When a fleet purchaser had no allotment, his order went to the bottom of the Colonial order pile (A-4274-6), waiting to see if Colonial could get any extra cars (A-4276). Eventually, the orders which remain unfulfilled for 2-3 months were thrown away by Colonial (A-4277-8), which explains why Colonial produced no records to the Justice Department during 1968 (A-4421-2, 4272).

Available cars were sold by Colonial to retail customers (who paid higher prices), then to qualified leasing companies (so that Colonial could get the extra cars from GM), and only if Colonial had any cars remaining would Nabcor have received any cars (A-4276). Colonial wanted to sell cars to Nabcor (NIA 170-1; A-4260, 5403-6) but did not have the supply from GM (A-4421-2). Nabcor was sued by one of the brokers who claimed he did not receive the Cadillacs ordered by him from Nabcor (A-5566-71), and by 8-11 other Nabcor franchisees who claimed non-delivery, other non-performances or fraud by Nabcor (E-1293).

Oldsmobiles: Defendant Paragon Oldsmobile agreed on 5/13/66 to sell Oldsmobiles to Nabcor at \$75 over cost less 1% of the cost, amounting to about \$40 to \$50 over cost (E-316), but refused, during late 1966, to deliver any of the few cars ordered by Nabcor during and after May, 1966 (NIA-227, A-2922). Paragon's manager, O'Brien (NIA-217), told FM in 12/66 that O'Brien called the Oldsmobile Zone office of GM and was told that Nabcor did not have a fleet certificate and that GM is shutting Nabcor off from its sources of supply of GM cars all over the place, and for that reason Paragon cannot sell any cars to Nabcor (A-2922). Also, on the same day, Paragon's President, Goldsmith, told FM that Paragon was one of the largest Oldsmobile fleet dealers in the United States and that Goldsmith wanted to sell cars to Nabcor (A-2927), but could not because the Oldsmobile Zone had told him not to sell to Nabcor (A-2928) because Nabcor did not have a fleet certificate and was "bootlegging" cars (A-2928). Even if Nabcor paid him \$300 or \$400 per car over his cost and put the car in Nabcor's customer's name, Goldsmith said he didn't think he would take the chance (A-2928). He said he has good relationships with GM and he cannot afford to lose his GM franchise (A-2929). Accordingly, he will not sell the cars to Nabcor (A-2929). Two years later, Paragon's Goldsmith told FM that he would like to sell cars to Nabcor if Nabcor got a fleet certificate and became a

leasing company (A-2929-30; 2931-2). Goldsmith had a very good relationship with GM and could not deal with Nabcor because it would jeopardize the relationship (A-2933-4). Goldsmith told where he believed Nabcor could obtain a source of supply of new cars (A-2934-5).

Prior to 12/12/66, Nabcor also bought one car from Pitcairn Oldsmobile ordered 9/30/66 (E-45 line 6) and Nabcor's 2nd order of 10/3/66 was cancelled (E-95 line 13). Nabcor ordered 4 cars from Krause Oldsmobile in 10/12/66 (E-95 line 30, E-96 line 21; E-97 line 4, 9) and 3 were delivered, and 1 cancelled. Judge Griesa would not let FM testify that Pitcairn and Krause refused to sell any more cars to Nabcor (A-5515-6). The last car was delivered 58 days after ordered (E-96 line 21). On 12/12/66, Krause was Nabcor's supplier of Oldsmobiles, but Nabcor was to have its last delivery from Krause 6 days later (E-96 line 21).

Pontiacs: Ruckle Pontiac in Yonkers, New York agreed on 3/22/66 to supply Pontiacs to Nabcor at \$75 less 1% (E-171). Ruckle itself from 1/66 to early 1967 (A-3464, 3468) was acting as an automobile broker for sales of any make or model to doctors on a national basis (A-3322-4, 3328-9). The company had a fleet certificate for this purpose (A-3280-1). During 1966, Ruckle offered to buy 2/3rds of Nabcor for \$500,000 (A-3997). From 3/28/66 to 12/14/66 Nabcor ordered 22 Pontiacs from Ruckle (E-1353-4).

Stewart introduced FM to 3 New York Pontiac Zone officials, including Holzworth, the Pontiac Zone Manager (E-157), at the 10/66 meeting of the National Association of Fleet Administrators ("NAFA") in New York (A-2910-1), and FM described Nabcor's automobile business to them (A-2913). Holzworth encouraged Nabcor to purchase and sell as many Pontiacs as Nabcor could, so the Pontiac Division of GM could become the 3rd largest make of car, behind Chevrolet and Ford (A-2912). Holzworth said Nabcor should get a fleet certificate and he asked Stewart to make the necessary arrangements (A-2913-4).

As will be seen, the certificate was denied.

Ruckle fleet manager Stewart requested Walter Gray, Pontiac fleet representative (A-2915) to have a GM fleet certificate number issued to Nabcor (A-3378-81) and Gray told Stewart Nabcor would have to show proof of 1965 purchases by Nabcor which were registered in Nabcor's name (A-3380). Stewart told Gray that Nabcor was going to go into the leasing business (A-3425) and that if Ruckle obtained a fleet certificate number for Nabcor, Ruckle would be able to handle a large number of car sales to Nabcor (A-3425) and Gray said GM must have proof Nabcor is actually a qualified fleet company (A-3425).

Gray met with FM in November or December, 1966 a couple of weeks after the Holzworth meeting (A-2915-6). Gray told FM that he knew Nabcor was bootlegging cars and wanted to know if Nabcor had any cars registered in its name (A-2916). FM told him Nabcor did not (A-2916-7). FM gave Gray a list of 20 Nabcor purchases (A-2917). The fleet certificate request was rejected because the cars were not registered in Nabcor's name (A-2921) and Nabcor never got a GM fleet certificate (A-2921).

Stewart testified that he told Nabcor that if Nabcor was a GM-recognized fleet account, Ruckle could sell cars to Nabcor for dropshipment throughout the United States (A-3414, 3434-6) and Ruckle did not want to get involved with these dropshipments for Nabcor unless Ruckle had 100% cooperation from GM, as Hertz and Avis had (A-3436) with a national fleet certificate from GM (A-3436), which was required for Ruckle to supply cars throughout the United States (A-3436). Without the fleet number, sales to Nabcor would be drawn from Ruckle's retail allotment when Ruckle had a shortage of retail allotments and Ruckle then would have to turn Nabcor's orders down (A-3436-8).

Prior to these meetings with Holzworth and Gray, Ruckle was putting in Nabcor's orders as fleet orders. The 12 Pontiacs ordered as "fleets" for

Nabcor took 41, 41, 37, 47, 47, 37, 44, 38, 57, 55, 42 and 42 days, respectively (E-1353-4, cols. 2 and 8), for an average of 44 days. Beginning 10/11/66 (A-3467), Ruckle changed its Nabcor orders to "sold" (E-1353-4), meaning that the cars are to come out of Ruckle's retail allotment (A-3437). The first 9 fleet orders averaged 39 days (E-1353-4 col. 2 and 8), mostly at the outset of production of the 1967 models, and the subsequent 13 "sold" orders delivered to Nabcor averaged 46 days, in the latter half of the model year, when there would be fewer shortages (A-3310-2, 4370, 3725-6). During this latter period, Nabcor lost 4 orders (E-96 line 28; E-97 lines 1, 3, 28), the great majority attributable to delivery delays (A-5616).

The date 10/21/66 (E-6) was around the date of the 1966 NAFA meeting; 8 days before Ruckle changed Nabcor's orders from fleet to sold (DX B-7, E-1353-4) and several weeks before Gray denied Ruckle's request for a fleet certificate for Nabcor. On 10/21/66, Executive Vice President Peter Gordon of the NY ADA sent a letter to its directors and past presidents, including Dillon, the President of Ruckle Pontiac (A-3285-6, 3355), describing Nabcor's business, saying that it appeared to be legal, and saying that Nabcor was being brought to their "attention because this is a threat to our business" (E-6). Also, Gordon said he understood that all of the manufacturers' "fleet agreements contained a clause stating the car could not be sold within six months", but that Nabcor told him "this is not so, now" (E-6), as a result of the Supreme Court's decision in the California Discount case (E-6). Judge Griesa received this as evidence which Dillon may have seen (A-3285).

Ruckle continued to deal with Nabcor until 2/67, when it refused to deliver 9 cars it had on order (A-3924; NIA-246-50). At about this time, in early 1967, Ruckle ceased its own automobile brokerage business (A-3468).

Buicks: Kutner Buick was Nabcor's sole Buick supplier prior to 12/12/66 (E-94-8). Nabcor's first order was a locate delivered 8/19/66

(E-94 line 22). On 10/3/66, Nabcor started ordering 15 Buicks to be built by GM (E-96 lines 2, 4, 6, 11, 12, 18, 35; E-97 lines 10, 11, 17, 21; E-98 lines 2, 4, 12; E-100 line 37; E-101 lines 2, 14; E-103 lines 4, 5; E-103 lines 31, 33; E-105 lines 5, 10). Kutner did not deliver all of the cars - and the last 2 orders were replaced by Nabcor with Sharkey Buick (E-98 lines 4, 12), which delivered the cars; the order log (PX 450, E-93-147) shows that 8-10 cars were cancelled, and FM testified that a great majority of these cancellations were by the customers because of non-delivery (A-5616). The 10 cars delivered to Nabcor had delivery delays of 60, 50, 35, 47, 82, 46, 45, 40, 48 and 34 days, averaging 49 days. Beginning 2/3/67, Sharkey Buick accepted 6 additional orders and delivered 4, and did not deliver 2 (E-99 lines 4, 27, 28; E-101 lines 26, 27, 29), then in the spring of 1967 Sharkey Buick was taken over by Cunningham Buick, a GM division, and Nabcor as of 4/28/67 (E-101 line 27) was unable to buy any more cars from the dealer (A-5476-7). Two of the ordered cars were not delivered (E-99 line 27; and E-101 line 29).

Chevrolets: During 8-9/66 Penske Chevrolet in Philadelphia sold to Nabcor 2 "locates", cars already in stock or located from another Chevrolet dealer (NIA-172), or used-car "demonstrators" (E-94 line 18, 31; A-4165), then refused to accept any additional orders for submission to GM (A-4165, 4175-6); during 9/66, Norton Chevrolet in Philadelphia sold 2 locates to Nabcor (E-94 line 32 and E-95 line 5) then refused to supply any additional cars to Nabcor (A-4166-7); Nabcor placed its first 2 orders with Luby Chevrolet in Queens on 9/29/66 (E-94 line 14 and E-95 line 2), which were delivered 61 and 91 days later; and an additional 8 orders up to 10/14/66.

Midtown Chevrolet and Ruckle Refusals: Meanwhile, Ruckle introduced FM to Bud Morrison, national fleet manager of Don Allen Chevrolet at 57th Street and Broadway in New York, New York and Don Allen agreed to supply

Chevrolets to Nabcor (E-184-5). On 11/3/66, Nabcor switched the 3 oldest orders from Luby to Don Allen (E-95 line 11, 35; E-96 line 1) and on 11/7 to 11/16/66 gave Don Allen an additional 7 orders (E-96 line 26, E-97 lines 2, 6, 8, 12, 13, 15). The next Luby Chevrolet order was given 11/21/66 or 12/7/66 (E-97 lines 24, 27).

On 1 or 2 days before 12/12/66, Don Allen's Bud Morrison was hired by Nabcor to arrange for fleet purchases by Nabcor (A-2951-2) and a few days prior to 12/12/66, some of the Nabcor cars ordered through Don Allen had been received by Don Allen (A-2950-1). Normal industry delivery time was 4-6 weeks or 28 to 42 days (A-2948), and typically 28-30 days (A-5504), and the three oldest cars on order with Don Allen on 12/12/66 were on order since 11/3/66, a total of 39 days.

On 12/14/66, the NY ADA had a meeting concerning Nabcor, with Ruckle's President, Robert Dillon, in attendance, as a long-time director of the NY ADA (E-538; A-3284). Although Ruckle was still selling cars to Nabcor, the minutes did not reflect that Dillon (Ruckle) or any of the other directors were selling cars to Nabcor. The minutes of the meeting (E-539) stated that "The matter of Nabcor, Inc. has been referred to N.A.D.A. for action with the factories. This subject was brought up at the Chrysler Dealer Council meeting and Chrysler stated they had no leasing agreement with Nabcor. We have secured additional information on the principals and other chartered corporations and this information has been passed on to N.A.D.A. ... At the conclusion of Mr. Miranda's remarks, Mr. Malice brought to the attention of the Board the activities of the United Buying Service and the United Auto Brokers and indicated that he considered this a serious problem." (PX 627, p. 2, E-539). Judge Griesa allowed the minutes into evidence only as background information, but not for all purposes (A-3296).

On 12/12/66, GM acquired as an unincorporated division all of the

assets of Don Allen Chevrolet (A-2949-50), and immediately refused to deliver any of the cars Nabcor had ordered (A-2953-4). In 1/67, prior to 1/6/67 (A-2953), FM spoke with Walter Englert, National Fleet Sales Manager for GM's Midtown Chevrolet-Pontiac Division, who had been Morrison's subordinate only several days earlier (A-2953). Englert agreed that the Nabcor cars were in for 2 weeks or longer and that GM was not going to give the cars to Nabcor because Nabcor was bootlegging the cars by reselling them and that Nabcor does not have a fleet certificate or fleet certificate number. GM is not going to give Nabcor the cars to sell to someone else. FM told Englert that Nabcor already had customer cancellations because of the delays (A-2954). Nabcor's employees tried for 2 weeks to get the cars but GM refused (A-2955-6).

FM then spoke with Englert's new superior (A-2955), Fred Watkins, Interim Branch Manager of GM's Midtown Chevrolet-Pontiac Division (A-2759 from evidentiary hearing), who said that it was GM's policy not to sell cars to people who would bootleg them in competition with GM's dealers. GM is not interested in making a profit on car sales through GM's Midtown Division but is interested in holding the prices up for GM's outlying dealers, to hold a legitimate price so visitors to New York would buy cars from outlying GM dealers because of a small price differential between GM's Midtown Division and the outlying GM dealers. Englert said that Nabcor is not going to undercut the price of such GM dealers and defeat GM's purpose (A-2956). A week later, Englert advised Nabcor it could have the ordered cars but no more (A-2958). Nabcor took only 2 of the cars (A-2958), the other orders having already been transferred to other Chevrolet dealers (A-2958) or cancelled by Nabcor's customers because of the delay (A-2958).

Nabcor gave 9 orders (E-541) to Ruckle on February 3, 6, 20, 23 and 28, 1967, the first 7 of which were accepted and processed by Ruckle (A-3499-3500; E-160-170). On 3/20/67 (E-158-9), Ruckle returned the 9 order

forms to Nabcor by mail and refused to deliver the ordered cars to Nabcor (A-3389). Ruckle's President, Dillon, testified that McNamara (A-3326), an official of the Pontiac Zone or of Pontiac (A-3333) visited Dillon at his home in Westchester County one weekend (A-3326-7, 3332-3) and spoke with Dillon about Nabcor and Nabcor's franchising activities (A-3334), indicating his "jerky brother-in-law" in Pennsylvania is thinking of buying a franchise to sell automobiles from the Nabcor "outfit" (suggesting derogatorily that his brother-in-law was stupid to think of getting involved with Nabcor). The following (A-3334), Dillon spoke with his fleet manager, Stewart, about Nabcor and then or 1-2 days later told Stewart to stop dealing with Nabcor (A-3336). Stewart testified that he acted upon Dillon's instructions not to deal with Nabcor on the date Ruckle ordered from GM the last car Ruckle sold and delivered to Nabcor, which order date was 1/27/67 (A-3389-3390; E-1354). The jury could conclude the foregoing, even though Dillon did testify that his meeting with McNamara may have been as early as late November, 1966 (A-3335). Late November, 1966 would have placed the McNamara meeting 2 weeks before the 12/14/66 NY ADA meeting about Nabcor which Dillon attended without revealing he was supplying cars to Nabcor through his Ruckle Pontiac.

Bates Pontiac Refusal: Eight of the 9 refused Nabcor orders were reordered by Nabcor at Bates Pontiac in the Bronx and delivered to Nabcor (E-99 lines 1, 16, 17, 18, 19, 20, 31; and E-101 line 3) and 1 prior Ruckle order was customer cancelled because of the delay (E-99 line 5). Bates Pontiac accepted 17-18 additional orders from Nabcor and delivered 12 cars (E-101-3), and 5 cars (E-103 lines 7, 12, 18, 20 and 26) ordered during 5/67 were not delivered to Nabcor, which FM testified he told Belcher of the GM Chairman's staff was the result of Bates' refusal to deal with Nabcor (A-3090).

Other Early '67 Refusals by GM Dealers: In rapid succession during early 1967, other GM dealers refused to deal with Nabcor, including Colonial Cadillac, which failed to deliver (A-5438-9) any of the 44 (E-94-99; A-4217) 1967 Cadillacs ultimately ordered by 1/67 by Nabcor; Rosenstock Oldsmobile during 3-4/67 (A-5475), Luby Chevrolet during 3/67 (A-5475). Also, various Ford dealers refused to deal with Nabcor after accepting orders (A-5477-8). Nabcor's order log (E-93-147) from inception in early 1966 to 11/15/67, when FM went to Europe to see if he could obtain GM cars for resale by Nabcor in the United States (A-2973), show the last date of ordering by Nabcor from the following Ford dealers: Reading Motors, 6/28/66 (E-94 line 9); Yonkers Ford, 11/7/66 (E-95 line 34); Chestnut Motors, 11/21/66 (E-97 line 23); Semmes Motors, 11/21/66 (E-47 line 18); Robin Ford, 1/13/67 (E-99 line 8); Grand Ford, 2/13/67 (E-99 line 33); Circle Ford, 7/10/67 (E-105 line 17); Quakertown Ford, 7/7/69 (E-127 line 12); and Village Ford, 4/7/70 (E-133 line 36).

Immediately after the refusal to deliver by GM's Midtown Chevrolet Division during 12/66 and 1/67, and Colonial's failure to deliver the 44 Cadillacs by 1/67, and with the preceding refusals experienced by Nabcor, Nabcor released all but 6 of its 50-60 employees during 1/67 and curtailed its operations, hoping these supply problems could be cured, ultimately. At this time, Nabcor had only \$16,000 in cash in the bank, \$271,000 in liabilities, and a deficit of \$124,000 (E-981).

D. BUFFALO EVENTS (Mid-1967 to Early 1968)

Because of these refusals to deal with Nabcor in late 1966 and 1/67, (A-2875-6), Nabcor changed its franchise structure from a 1-level "Broker" franchise (A-2874) to 3 levels (Broker, Area Broker and Master Broker) (A-2875), to provide local assistance and control of the Brokers

(A-2836). Some Master Brokers, General (A-4722) and Nabcor East (A-4417), became licensed dealers, to buy cars from local dealers.

During 6-8/67 (E-630, 636), Nabcor's first Master and Area franchises were sold. A Master Broker, with a territory of approximately 1,000,000 population (A-2878), was to have 10 Area Brokers (A-2877-8), each one with 10 Brokers (A-2877).

Nabcor ran newspaper franchise ads in Buffalo (A-4563, 4695; E-1377) and from 7-11/67 Nabcor sold 4 franchises in the Buffalo area: (i) a broker franchise to plaintiff Strimple in 7/67 (NIA-2386), d/b/a General Auto Sales (A-4696); Strimple had been sales manager of an Oldsmobile dealer and had 20-25 years of automobile experience (A-4695); (ii) a broker franchise to Don Bolling on 7/17/67, d/b/a Multi-Make Auto Sales (E-637), predecessor (A-4709-12; NIA-2394) to plaintiff General Auto Sales & Leasing, Inc. ("General"); Bolling had worked for defendant Clements-Gillogly and a Ford dealer during 1965-6 (NIA-2131); Bolling ran car advertising in 8/67 (NIA-2394); (iii) a broker franchise to Richard Owens d/b/a American Auto Brokers on 7/31/67 (E-633); and (iv) a broker franchise to Eugene Novy and Auto Livery, Inc. on 7/31/67 (E-634). Bolling and Strimple merged their 2 businesses (A-1709-12; NIA-2394) and simultaneously acquired a Master Broker franchise from Nabcor, on 10/6/67 (E-1346), operating as plaintiff General thereafter (A-4717-24, 3893-4). Plaintiff Young in Watertown, New York bought a Nabcor franchise during 6/67 (E-636) and from 3/68 to 9/70 submitted 36 orders to General (NIA-2975-6, A-4737).

Bolling, Strimple and Auto Livery, Inc. solicited orders for new cars (A-4698) and submitted their first orders to Nabcor on 9/18/67, 9/25/67 and 9/25/67 (E-107 lines 26, 32, 33). On 9/29/67, defendant Buffalo Automobile Dealers Association ("BADA"), which later changed its name to the Niagara Frontier Automobile Dealers Association, published a bulletin dated

9/29/67 (E-40-41) critical of Nabcor and Nabcor's franchisees in Buffalo and mailed it to all of its 88 member dealers, including defendants Bain Chevrolet, Clements-Gillogly Chevrolet, Campbell Chevrolet and Batt Buick and co-conspirator dealers; 17 associate members including Ford, Chrysler and AMC; and 35 others, including Gordon of the NY ADA and 24 other ADA's (E-320-4). The BADA Bulletin was headed "A RASH OF AUTO 'BROKERS' HITS BUFFALO" (E-40) and invited its dealer and other recipients to boycott plaintiffs, by saying: "We cannot for the life of us think of any reason why a retail dealer would want to get involved in such a scheme. It would only defeat the very purpose for which you are in business. Sure hope YOU all feel the same way." (E-41) During argument on defendants' motions for a directed verdict, Judge Griesa said: "... I've got to tell you on this..., it would seem to me there was a jury question if the purpose of the memo is at issue; a jury could find there was a purpose to induce action. It seems to me that the jury could further find that the people in authority at Campbell, at Bain, and Gillogly refused it, and the jury could further find that Campbell refused to sell because of the bulletin." (A-6058) Also, Judge Griesa said, "I think the jury could find, could they not, that Bain refused to sell not only because of the bulletin but because it was told by the zone not to? There is a lot of testimony about Bain." (A-6059).

The BADA bulletin was given by Buffalo Chevrolet Zone Manager Womack to GM District Manager English and the other Chevrolet District Managers in Buffalo at a meeting of Zone personnel during the fall of 1967 (E-40-41).

From 7-11/67, Bolling and Strimple went to various GM dealers in the Buffalo area, most of whom were members of the BADA (indicated below by an asterisk), to obtain sources of supply and were refused by each, from 9 or 10/67 through 12/67 or early 1968, as follows: defendant *Bain Chevrolet

(A-2961-5, 4523, 4739, 4743-51); defendant *Clements-Gillogly Chevrolet (A-4521, 4528-9, 4533-44, 4715, 4766-7); defendant *Campbell Chevrolet (A-4523, 4741, 4792-3, 4795); defendant *Batt Buick (A-4480, 4482-9, 4522, 4741, 4751-5); co-conspirator Kem Dengler Chevrolet-Oldsmobile (A-4479-80, 4521-2, 4524-8, 4739, 4755-8, E-57-58); co-conspirator *Laks Chevrolet and Buick (A-4522, 4544-5, 4792-3, 4739, 4758-9, 4767-84); co-conspirator *Hallman Chevrolet (A-4790-1); *Keller Chevrolet (A-4523, 4739); *Brown (Pontiac) Motor Sales (A-4740); *Tinney Cadillac (A-4523, 4740); *Holiday Oldsmobile (A-4740); *Keyser Pontiac-Cadillac (A-4741); Dengler Chevrolet in Fredonia (A-4545-6); *Sevens Buick (A-4523), the owner of which said he was not interested in dealing and referred to the BADA bulletin by saying "rash of brokers" (A-4786-7).

During this time, General was not able to get GM cars from any Buffalo-area dealers (A-4479-81, 4523, 4793, 4799).

Defendants Bain, Clements-Gillogly, Campbell and Batt told Nabcor or General that: English advised Clements-Gillogly not to sell (A-4730); during late 1967, GM's Wonack told Bain not to sell (A-4748) because Nabcor is shipping these cars all over the country and has no fleet certificate (A-2965), and that Bain could lose his franchise (A-2965); this occurred after Bain had agreed to sell 200-400 cars (A-4745-6, 2961); Bain was financed by GM (A-4788) and Bain said he was going to talk about the Nabcor matter with GM or the other dealers (A-5204); during 1/68 approximately Mr. Batt said the Buffalo Chevrolet Zone physically removed from Batt's place of business a 1968 Buick ordered 12/5/67 (A-4638) and set aside for General after its receipt on 1/22/68 (A-4752-3), which Batt's sales manager said he never saw happen in his 20 years of experience (A-4753); during 9-12/67, Campbell said it couldn't deal with plaintiffs (A-4788-9).

GM District Manager English told Holstead and Hamister, officials

of defendant Clements-Gillogly, in front of Bolling, that he knew all about Naboor and General (A-4542) and that any GM dealer caught selling cars to Naboor will find it difficult to get new cars (A-4542). This obviously is a threat to cancel the dealer's GM franchise, by terminating his source of supply of GM cars. This threat occurred during early 10/67 (A-4537). English said Naboor was a slipshod operation and Bolling should have had enough business sense not to get involved (A-4542). Shortly thereafter, English confirmed to Bolling, Holstead and Hamister in a chance restaurant meeting that none of the dealers for whom English was the GM District Manager were going to sell plaintiffs cars and that if any were caught by GM they would find it very, very difficult to get new cars (A-4543).

Also, one of the refusing Chevrolet dealers during 10/67 told General, acting as Naboor's agent to buy 200 cars, that it could not sell the cars to Naboor (E-57-8). GM told the dealer it was allotted only 6 to 8 new cars per month by GM and the dealer told General it would not accept the order because of its limited retail allotment. General became angry and accused GM of telling the dealer to refuse the order, and the dealer refused to identify the GM officials, according to GM's files. The dealer then reported to the Chevrolet Zone, and the Zone Manager Womack then communicated with DiSimone of the Philadelphia Regional Office of the Fleet Section, who reported the event to Olson, Director of the Fleet Section (E-57-8), who was currently investigating FM's charges made on 12/14/67 to defendant Donner's Assistant (E-809) and to GM's Karney the following day (E-46-7) that the GM Chevrolet Zone in Buffalo, including Robert English, was interfering with GM dealers who were trying to sell to Naboor (A-3071, 3102-3).

On 10/6/67, General had working capital of \$2,500 to \$3,000 (A-4552), which lasted 2-3 months (A-4558, 4684), at which time General

ceased looking for Buffalo dealers (A-4669). This amount would have been sufficient in the car brokerage business to deliver 200 cars per year (A-4999) assuming no retention of profits; General had no income (A-4800) and insufficient capital to keep going (A-4800). Bolling left in the spring of 1968 because of General's insufficiency of funds (A-4548, 4684, 4693) and General ceased its minimal business operations in 1970 (A-4800, NIA-2975). Starting in 4/68 (E-796-7) General started obtaining deliveries from local GM dealers, the first car being ordered 1/22/68 or after from Batt (4752-3) or from Clements-Gillogly on 1/30/68 (E-796-7), followed by sales made by Laks Chevrolet, Brown Pontiac, Keyser Cadillac, Bob Bain Chevrolet (E-796-7). Each of these sales and orders occurred after FM complained to Donner's office on 12/14/67 (E-809). Thus, Strimple was able to purchase cars from defendants and any other Buffalo dealers (A-1814-6), but only by pretending, with the dealer's knowledge (A-4817), that General was purchasing the cars for Econo-Car, a GM-approved daily rental car company (A-4807) with a GM fleet certificate (A-4818). Billing was to General (A-5059). This arrangement got started prior to 2/1/68 (A-4990) when Mr. Hennessey of Econo-Car introduced Strimple to Holstead of defendant Clements-Gillogly saying that Strimple was going to sell leases for Econo-Car and that Strimple would be needing cars (A-4808-9, 4814-5) and General ordered over 100 cars for the leases sold by General (A-4810) and about 36 cars for Broker Young (NIA-2976, A-4813) and 10-15 cars for General's own Nabcor customers (A-4812). Prior to this association with Econo-Car, General or its predecessors (Strimple and Bolling) were unable to buy a single GM car from any Buffalo dealer (A-4479-81, 4523, 4793, 4799), except the 1968 Buick reordered by Batt 1/68 after it was removed by GM from Batt's premises during 12/67; the car was ultimately delivered 2/22/68 (A-4755). After start of the association with Econo-Car, General could get any car it wanted from any Buffalo dealer

(A-4814-6). Throughout the period 7-12/67, General had asked each GM dealer for help in getting Nabcor or General a fleet certificate number, but was not able to obtain a fleet certificate or fleet number (A-4817-8).

At 10/6/67, Bolling had about 8-10 unfilled orders which he transferred to General (A-4477-81). Instead of ordering the cars from Nabcor, as Bolling had done with his initial order, these orders were used to try to obtain sources of supply from GM dealers in Buffalo, but the orders were refused, or accepted then refused, by the above GM dealers (A-4478-80). When Bolling and Strimple realized they would not be able to get these or any other cars from Buffalo dealers, Nabcor advised General to submit the orders to Nabcor (A-4676, 4681), which took place 10/18/67 as to a Pontiac order (E-109 line 26) and on 11/13/67 as to 5 Chevrolet or Corvette orders (E-109 line 12) and the final order to Nabcor on 11/29/67 (E-111 line 23 for another Corvette). Nabcor never obtained a Cadillac ordered by Multi-Make for customer Stanton, Bolling's original order to Nabcor (E-107 line 26, A-4663-8, 4792) and Stanton cancelled his order (A-4669-70); and customers Stachura (A-4792), Morawski (A-4792) and Schmitt (A-4792, 4795) cancelled their orders because of the delays (A-4672-3, 4684, 4792-5). Schmitt purchased his Corvette from defendant Campbell Chevrolet (A-4795). The Vosseler Chevrolet arrived 139 days after ordered by the customer (A-4682, 4796), which was an unacceptable delay for the businesses of General and Nabcor (A-4797). Because General could not get any local dealers to deal with General or Nabcor (A-4687-8, 4847), General had to pick up cars ordered from Nabcor in Jenkintown, Pennsylvania and drive them back to Buffalo, which was unacceptable because of the added cost (in comparison to the small markup) and because the Nabcor customer was then receiving a used car (A-4686).

E. MID-1967 BEFORE ROHRER CHEVROLET

Matt Slap Chevrolet in Philadelphia was picked up as a new Nabcor supplier on 1/23/67, delivering its first car (a locate) to Nabcor on 1/27/67 (E-802-8, 99 line 13). Al's Community Olds in New Jersey delivered its first car (a 1967) on 7/28/67 and Rohrer Chevrolet in Camden, New Jersey delivered its first car (a 1967) on 8/8/67 (E-802-3). GM spoke with co-conspirator Brennan of the New Jersey Motor Vehicle office about the Oldsmobile bought by Nabcor for customer Sardinas from Al's Community Olds (E-90) and was told that Nabcor has no leasing operation but resells the cars, and that New Jersey will not respect Nabcor's transfer of title to the Nabcor customer. This was interference by GM with Nabcor's business. GM looked in the R. L. Polk new-car registration books for 1966-67 and saw no listing for Nabcor (E-23).

On 8/13/67, Nabcor ran a franchise ad in a Youngstown, Ohio newspaper (E-78), which was forwarded, together with a highly detailed 4-page report on Nabcor, by the Registrar of the Ohio Bureau of Motor Vehicles to Martin Chevrolet, in Warren, Ohio (PX 397, E-77), who on 8/25/67 (E-77) forwarded the information to his GM Zone, which forwarded the letter and information to GM Headquarters in Detroit, from which it went to the GM Sales Section in Detroit, where it was discussed with Mr. Foley (E-76), who was supervising the 1966 investigation of Nabcor (e.g., PX 400, E-83). The report stated that Nabcor's brokers could undersell the local franchised dealers because of the low Nabcor overhead (E-79); that dealers are happy to make the extra money from Nabcor (E-80); and that Nabcor will be selling at least \$200 below the local dealer's best price (E-81).

During the summer of 1967, FM met George Zibold (A-2966) at Zibold's office in the New York GM Building, 57th and Broadway (A-2967). Zibold was in charge of single car deliveries in the United States for the Foreign Distributors Division of GM (A-2966, 2998-3003, E-156). FM outlined Nabcor's

problems to Zibold, who referred FM to Zibold's brother-in-law, a Cadillac salesman in the Cadillac Division showroom across the street from Zibold's office (A-2968-9). The brother-in-law told FM he could not order cars for Nabcor, and could only sell to Nabcor out of the stock of the GM Cadillac Division, at retail instead of fleet prices, with title to be placed immediately in the name of Nabcor's customers (A-2969-70). The brother-in-law had FM speak with his superior at the GM Cadillac Division, who said he could give Nabcor a ve limited number of cars, but at retail prices and in the name of the Nabcor customers; this was so because the GM Cadillac Division would roast him if it found out (A-2970). FM said that buying at retail was unsuitable for Nabcor (A-2970), and FM went back to Zibold, who said that the only way he could help Nabcor was through some of GM's overseas dealers (A-2970), and that Nabcor would have to go overseas to arrange for the purchases (A-2970-1) and Zibold and his Overseas Division of GM could deliver the cars in the United States to Nabcor's customers (A-2971). FM agreed to try (A-2971), and in furtherance of the plan, Zibold started to give FM some letters of introduction to 3 GM dealers in Spain, Messrs. Jimenez, Linde and Schader (A-2971; E-150-1) but first had FM speak with Zibold's superior to clear the letters of introduction, dated 9/26/67 (A-2971-2). After FM told the superior why he needed the letters, and the superior approved of their issuance (A-2971), FM received the letters (A-2971). FM went to Spain in the middle of 11/67 and met with the GM dealers (A-2973). The dealers were willing to sell cars to Nabcor (A-2975), but not in a way acceptable to Nabcor (A-2977-83, 3044-5 - not before the jury).

Excluded Testimony by FM: The court below excluded testimony (A-3044) by FM that Zibold knew all about Nabcor and its problems getting cars and that the dealers are shutting Nabcor off all over the place (A-2968); Zibold guessed that the problems were the reason that FM was there to see

Zibold (A-2968); GM was tracing serial numbers back to Nabcor's sources of supply (A-2968); Zibold doubted whether Nabcor was going to get any cars in the New York area (A-2968); and he didn't know of any dealer who would sell to Nabcor (A-2968).

F. ROHRER CHEVROLET (starting 9/67)

After losing its Chevrolet suppliers for the 1967 model year, Nabcor established Rohrer Chevrolet in Camden, New Jersey as its primary source of supply on 9/6/67 (E-180), at the beginning of the 1968 model year and Nabcor obtained 11 1968 Chevrolets between 11/2/67 and 12/12/67 (E-107 lines 17, 30, 32-3, 37; E-109 lines 3, 14, 20-1, 25, 27; E-1426; E-1355-6). On the critical date of 12/13/67, there were 10 other cars on order (E-109 lines 29, 34, 37; E-111 lines 2 3, 8, 11, 12, 16, 19; E-1426; E-1355-6). The oldest order had been submitted on 10/25/67 (E-109 line 29 - customer Guarino of plaintiff Jamele), 49 days previously; the latest order had been submitted on 11/28/67 (E-111 line 19). The next order to Rohrer would be 12/27/67 (E-111 line 35), 2 weeks after the critical date of 12/13/67.

On 11/22/67, Rohrer submitted a fleet rebate application to the GM Philadelphia Chevrolet Zone requesting a \$50 rebate on cars 1-6 of the foregoing 11 sales to Nabcor (E-542). The Zone refused to pay the requested rebate and spoke by telephone with Rohrer on or about 12/13/67 (A-3529, 3532-3) to explain that Nabcor sales were not eligible because Nabcor does not have cars registered in its name or leased (E-542; A-3544, 3552-3). On or about 12/12/67, Speece, Fleet Representative of the Philadelphia Chevrolet Zone, was in Rohrer's premises (A-3523-4), which was the first of only 2 or 3 times Rohrer's fleet manager Madden ever saw Speece in Rohrer's premises over a 10-year period (A-3350-1, 3536).

As a result of Rohrer's communication with GM about Nabcor's orders

and the fleet rebate, Rohrer changed from its own method of ordering cars for Nabcor on a "fleet" basis and began checking the "sold" box on the GM whole-sale order form instead (A-3535, 3543-4), which meant that Rohrer was submitting the Nabcor orders thereafter as retail orders and not with a request for a fleet allotment with which to fill the Nabcor orders (A-3547). Each of the fleet and then the retail orders had Nabcor's name on it (A-3548).

Meanwhile, on 12/13/67, Rohrer was refusing to deliver any of the 10 cars ordered for Nabcor, 3 of which had been received by Rohrer (A-4163-4, 4155-61). These transactions were ultimately concluded, as follows: (1) E-109 line 29 delivered 4/11/68 after 169 days on order (Lot # 402 in Nabcor's police book, doc. PX 451, not included in exhibit volumes to appendix); (2) E-109 line 34 possibly delivered 1/10/68 after 70 days on order (but no Lot number); (3) E-109 line 37 cancelled 5/21/68 after 202 days on order; (4-5) E-111 lines 2-3 each delivered 12/27/67 after 51 days on order (Lot ## 339-40 in police book, not included in exhibit appendix; (6) E-111 "Stachura" Chevrolet cancelled 5/15/68 after 184 days on order; (7) E-111 line 11 "Vosseler" Chevrolet delivered 2/26/68 after 105 days on order (Lot # 380); (8) E-111 line 12 "Chambers" Chevrolet, a probable cancellation through delay (A-4684, 4690), with no record of receipt or delivery by Nabcor (E-1369, A-3542); (9) E-111 line 16 delivered 3/5/68 after 105 days on order (Lot # 386); and (10) E-111 line 19 delivered 2/23/68 after 87 days on order (Lot # 378).

On 12/12/67, the Assistant Manager of the Philadelphia Chevrolet Fleet Sales Department spoke with the GM Zone City Manager about "a situation confronting the Fleet Department ... concerning the delivery of cars to ... Nabcor", saying Nabcor's advertising in the New York Times guarantees

GM advised the dealer previously that Nabcor seemed to qualify for purchasing, but new facts show that Nabcor does not. The Philadelphia City Manager is going to alert the dealers concerning Nabcor and have the Fleet Representative contact Nabcor. If Nabcor does not qualify under the Plan, the Zone Manager will decide whether to include Nabcor anyway (PX 247, E-26).

The following day, on 12/13/67, Speece and DiSimone, Director of the Regional Office of the Fleet Section, paid an unannounced visit to Nabcor's premises in Jenkintown and spoke with Anthony Maiorana ("AM") to discuss Nabcor's eligibility for a fleet certificate (PX 307, E-37). AM stated that Nabcor was not interested in any fleet rebates (E-37) and explained the Nabcor system to them (A-4063). AM gave them a copy of Nabcor's lease agreement (E-37). In response to their request about identification of Nabcor's sources of Chevrolets, AM told them Rohrer (A-4063) and/or Matt Slap Chevrolet (A-4152). Between 8/8/67 and 12/13/67 (A-4064, 4170; E-802-8), Nabcor had purchased 12 cars from Rohrer and 2 cars from Matt Slap (A-4170, E-802-8). At the end of the meeting, they told AM that Nabcor was not qualified to buy cars for resale (A-4064); that if Nabcor qualified as a fleet buyer it would not be able to resell the cars (A-4064); Speece said that GM dealers would not sell Nabcor any cars for resale (A-4064). Speece and DiSimone said they would see to it that Nabcor would not get any cars for resale (A-4064).

Excluded Document PX 502: Judge Griesa refused to admit PX 502, E-181) even though the authenticity was proved by witness Madden, who worked under and for the author of the letter, now deceased (E-1059-61) in the Fleet Department of Rohrer Chevrolet. The letter dated 8/20/68 stated that order # 10758 was returned to Rohrer by GM because Nabcor is not a recognized fleet account and the order would have to be taken from Rohrer's retail allotment of Chevrolets (E-181).

Rohrer's Madden testified that Rohrer wanted Nabcor's business (A-3551), that Rohrer placed each of Nabcor's orders with GM as soon as Rohrer received the order from Nabcor (A-3553-4) and that it normally took between 4-6 weeks, 28-42 days, to obtain the ordered cars (A-3545-6). Yet, out of the 87 cars Nabcor obtained from Rohrer from 11/2/67 to 7/30/70 (E-802-8), 72 (83%) had delayed deliveries averaging 63 days after ordered by Nabcor (PX 716, not in exhibits appendix). The average delayed delivery to Nabcor took almost twice the time normally experienced by Rohrer (35 versus 63 days) and resulted in cancellations by Nabcor customers not willing to wait, e.g., Cheeseman, Stachura and Chambers above.

G. BELCHER, KARNEY AND FLEET CERTIFICATE (12/67-2/68)

On 12/14/66 (E-809), 1 day after AM's meeting with Speece and DiSimone and while Rohrer was holding up deliveries on Nabcor's orders (A-3079), FM called the office of defendant Roche, GM President (A-3052, NIA-404) to discuss FM's charges that GM was violating the injunction of the court in the California Discount case (NIA431). FM met with Belcher, Donner's Staff Assistant (E-811), who told FM, at FM's request, that he spoke with the Chairman's (NIA-432) or Roche's (E-43, A-3052, NIA-404, NIA-432) specific authorization just obtained by Belcher.

FM described Nabcor's business reselling all makes and models of new cars Nabcor bought at fleet prices from franchised dealers (A-3071) and that General told FM that GM's District Manager Bob English (A-3083), in front of a witness, and other district managers in the Buffalo Chevrolet Zone are directing their GM franchised dealers not to sell to Nabcor and threatening them with franchise cancellation (A-3071). Also, FM said that the BADA sent out a bulletin advising dealers in the Buffalo area not to sell to Nabcor. FM gave Belcher a copy of the bulletin (A-3071). Belcher said he

was aware of these things happening (A-3072, 3084); that GM's district managers, recent college graduates, are overzealous and can become threatening in this way (A-3072); and GM headquarters cannot control them (A-3072, 3082). FM said this violated the injunction in the California Discount case (A-3073); the GM district managers have destroyed all of Nabcor's Buffalo sources of supply (A-3073) and when Nabcor seeks car sources from small, outlying dealerships (in areas away from the city) they ask Nabcor for a fleet certificate number, believing it is a GM requirement to sell to Nabcor (A-3073). FM said it was difficult getting new sources, and each is being destroyed by this GM Zone interference (A-3073).

FM told Belcher that Rohrer was refusing to deliver cars (A-3081, 3084-5) because of the Philadelphia Chevrolet Zone and Belcher said he will inquire (A-3082). Belcher said GM's solution to the reselling problem was to trace serial numbers of cars back to the selling dealer (A-3084), which is what happened to Nabcor because of the fleet rebate application by Rohrer Chevrolet (PX 642, E-542).

Also, FM told Belcher of the 1966-67 problems in the New York Zone, including the refusal to deliver by GM's Midtown Chevrolet Division (A-3085-90), Ruckle Pontiac (A-3087, 3090), Chief Pontiac (A-3087, 3089-90), Bates Pontiac (A-3087, 3090), Colonial Cadillac (A-3087, 3090), A.C. Chevrolet (A-3089), Luby Chevrolet (A-3089). Because of these problems, Nabcor got sources of supply in Philadelphia (A-3086). Also, FM told Belcher that GM's Midtown Chevrolet Division told FM its purpose was to hold prices up for GM's outlying Chevrolet dealers and not to make a profit itself, according to Midtown's manager (A-3089). Watkins, Interim Branch Manager of GM's Midtown Chevrolet Division at the time of the refusal to deliver cars to Nabcor, testified at the evidentiary hearing that he does not suspect that the Midtown Division made a profit during his management of it (A-2815).

FM said GM should act immediately because General is going to the Justice Department, which wanted to know about these New York refusals (A-3077). FM said Nabcor wants a business, not litigation (A-3077) and GM's interference was illegal (A-3077). FM said he was alerting top GM management before going to the Justice Department (A-3077).

FM asked Belcher to have a letter sent by GM to all GM dealers saying they are free to sell to independent dealers, and give FM a copy of the letter to show to dealers (A-3074), which Belcher refused to do (A-3075). Belcher asked if the issuance to Nabcor of a fleet certificate would help (A-3075). FM said it would, that when dealers inquire, the Zone tells them Nabcor has no fleet certificate and, therefore, the dealer should not sell cars to Nabcor (A-3075). FM was willing to settle the problems which had been created for Nabcor if GM issued a fleet certificate to Nabcor (A-3075) and FM said to Belcher that Nabcor would even buy a few cars and go into the rental or leasing business, to satisfy GM's dealers, if GMAC financed the purchase of such cars and if such purchase would help in getting the GM fleet certificate (A-3075-6). Belcher said he would try to help Nabcor (A-3076). Also, Belcher gave FM the name of Mr. Drury, head of GMAC (A-3076, 3093) and said he would call Drury to see if GMAC could finance Nabcor to enable Nabcor to get a fleet certificate and alleviate Nabcor's problems (A-3076). Belcher called Drury (A-3094). The next day, FM called Belcher again to inquire about GMAC financing of a small fleet of daily rental cars and Belcher asked GMAC to contact FM about this (E-810).

On 12/14/67, immediately after his meeting with FM, Belcher made a single call, to Detroit, and spoke with Herman Sattler (E-809), a high GM official superior to the Fleet Section and its Director, A. T. Olson (E-43-5). Sattler dealt immediately with Nabcor's complaint and issued instructions on the same day; Sattler was kept informed throughout the period and even after

the fleet certificate was denied (E-70). This is evidence that Belcher, Roche and Donner were wholly familiar with the type of complaint being made by Nabcor, and the inevitable GM method of handling it, by delay, pretense and ultimate fleet certificate denial.

Olson told Karney to contact Nabcor (A-5661) and on 12/15/67 Karney, the North Eastern Regional Director of the Fleet Section, in New York, met with FM and requested and obtained detailed and highly confidential information from competitor Nabcor about its business (E-811). FM said Nabcor's GM dealers in some areas, including Buffalo dealers, were not fulfilling their commitments to Nabcor, and a Chevrolet district manager in Buffalo advised a dealer not to sell to Nabcor. FM demanded that GM stop this. FM was told about GM's fleet certificate requirements and FM requested assurance that, if Nabcor met the requirements, it would be issued a fleet certificate. Karney said he could not assure this because all approvals for issuance of fleet certificates came from Detroit, but Karney would make Nabcor's proposal known to Detroit (E-811). Karney transmitted this information to the Fleet Section in Detroit and to Belcher (E-811).

On 12/20/67, DiSimone advised the Fleet Section about the DiSimone and Speece meeting on 12/13/67 with AM in Jenkintown (E-814) and the next day DiSimone spoke with Womack, Manager of the Buffalo Chevrolet Zone, concerning the 9/29/67 BADA bulletin and Heinrich Chevrolet communication about the Nabcor Retailer ad (PX 309-11, E-39-42). On 12/21/67, in another communication between Womack and DiSimone, Womack told about a small Chevrolet dealer in Buffalo refusing to sell 200 cars to Nabcor because Womack would not give the dealer additional cars over the dealer's retail allotment of 6-8 cars per month (E-57-58). There was no indication that such refusal to supply cars by GM to its own GM dealer occurred because of any shortages. In fact, Nabcor's orders do not increase the overall demand for GM cars (except to the

extent Nabcor's lower prices encouraged persons to buy cars of all makes they otherwise would not buy); instead, Nabcor's new-car orders were orders taken away from GM's dealers and therefore already included within GM's production schedules.

Olson, Director of the Fleet Section, did not investigate Nabcor's charges because, Olson testified, they were "hearsay" (A-5666) and he did not speak with, or request DiSimone to speak with, Womack about it (A-5667). Olson contacted the Chevrolet Division but did not follow up to determine what if anything had been done (A-5667, 5670), knowing that Chevrolet may not investigate (A-5667); and Olson never received any report on the Nabcor matter from Chevrolet (A-5689-90).

On 12/21/67, DiSimone spoke with the Fleet Section about Nabcor (PX 309, E-39) without advising it about this refusal to deal by the small Buffalo-area dealer (PX 339, E-57-58). Womack forwarded to DiSimone copies of the BADA Bulletin and Heinrich Chevrolet communication; on 12/26/67 DiSimone transmitted copies to Olson (PX 309-11, E-39-42, A-5678), who sent them to Sattler, who sent them to Belcher along with other information about Nabcor developed by the Fleet Department during 1967 (PX 312-4, E-43-5).

Sattler told Belcher on 1/2/68 that he seriously doubted that GM will have any further inquiries from Nabcor, and Sattler stated that he was closing his file on Nabcor (PX 312, E-43).

The next day, on 1/3/68, FM visited Belcher (A-3099-3100) to see if he could expedite the requested help (A-3100) and reiterated his complaint that GM Zone personnel were interfering with GM dealers who wanted to sell cars to Nabcor; FM claimed that some Nabcor franchisees were getting set to sue GM and its dealers; that a fleet certificate could solve the problem; and that FM expects to see Karney the following day (PX 316, E-48). Belcher immediately discussed the GM meeting with Sattler and confirmed his discussion

by letter of the same date (PX 316, E-48). Instead of telling Nabcor that GM had already decided and knew (PX 312, E-43, A-5670-2, 5693) it would not issue a fleet certificate to Nabcor, GM was giving Nabcor the classic run-around, causing additional damage to Nabcor through the wasting of management time and overhead expense. GM knew that Nabcor was having financial difficulties (E-83), which had to be furthered by the numerous refusals to deal.

On 1/4/68, FM met with Karney in Nabcor's office in the New York GM Building (A-3100), and FM told Karney what he told Belcher (A-3102-3), that the Buffalo Zone was aware of these events, including the activities of Bob English threatening a GM dealer with cancellation; Karney said the purpose of the meeting with Nabcor was to expedite issuance of a fleet certificate to Nabcor (A-3103), a representation which turned out to be totally false. Then, Karney took FM across the street to a 1-1/2 hour meeting between FM, Karney and Fogg, a Fleet Representative of the New York Chevrolet Zone (PX 332, E-53, A-3101-2). FM reiterated the events to Karney and Fogg (A-3104, E-54). FM said Nabcor would not have to pursue these matters if Nabcor got a GM fleet certificate. FM demanded an early decision. Karney did not tell FM (A-3128) he already knew of some of the matters about which FM complained because Karney had advised the Fleet Section in his memo about his meeting with FM that GM's Midtown Chevrolet Division got advice from a GM staff attorney, on or before 1/67, to sell the ordered cars to Nabcor (PX 332, E-54).

Fogg asked detailed questions about the Nabcor system, and got detailed answers, including a reference to the United States Supreme Court's decision in the California Discount case (A-3106-7). FM spoke of the problems Nabcor was having with GM's new-car warranty (A-3108-9). Fogg asked why GM dealers should service the cars sold by Nabcor (A-3112). Fogg asked about Nabcor's sources of supply (A-3116) and asked how Nabcor could continue to

get cars if Nabcor did not get a fleet certificate (A-3116). FM refused to give Fogg and Karney a list of Nabcor's suppliers (A-3116) because of FM's belief that GM would harass the suppliers (A-3117). FM said he wanted a fleet certificate only because it would indicate to GM dealers that they are free to sell to Nabcor if they wished (A-3117). Karney said these detailed questions were asked to see if Nabcor qualified for a fleet certificate (A-3118) and this is just repeating what has happened times before, said FM (A-3119).

On 1/4 or 5/68 Karney prepared and signed a GM form of application for issuance of a fleet certificate to Nabcor, stating that Nabcor has no vehicles in its name and that Nabcor sells new vehicles (PX 328, E-49-50). FM never saw the application or knew its contents (A-3121-3), some of which was false (A-3122-3). Karney summarized his version of the meeting in a letter to the Fleet Section (PX 332, E-53-4), including a reference to the GM Midtown Chevrolet Division refusal (E-54). Karney forwarded the application to the Fleet Section (PX 332, E-53). FM called Belcher and complained about the runaround (A-3123-5); Belcher said "Detroit" has control of the problem, not Belcher or the GM headquarters in New York (A-3125), but Belcher said he now would go directly to the top officials in Detroit (A-3125), which could have meant defendant Roche (A-4390).

On 1/5/68, DiSimone reported to the Fleet Section an admission by Womack, made belatedly to DiSimone, that after publication of the 9/29/67 BADA bulletin, Womack gave a copy to each of his district managers; Womack stated he was of the opinion his district managers had not misapplied the information about Nabcor, but Womack stated that he will discuss the subject with them again (PX 339, E-57-58).

Prior to 1/5/68, the Fleet Section discussed the Nabcor case with R. M. O'Connor (PX 334, E-55), of the GM Sales Section, who investigated

Nabcor in 6/66 (PX 79, E-9, PX 286, E-31), misled a possible Nabcor franchise purchaser's attorney (PX 149, E-25), communicated to Roche about Nabcor (PX 285, E-30), and carried out Roche's orders about Nabcor during 1966 (PX 287, E-32). On 1/11/68, the Fleet Section sent Chevrolet (A-5681) and O'Connor copies of information about Nabcor, including the NY ADA report on Nabcor dated 10/21/66 (PX 74A, E-6-7) and confirmed a prior request to O'Connor that GM's field management and employees be advised quickly about GM policy in cases such as the Nabcor case (PX 334-5, E-55-6). Such communication, in writing, to GM's dealers is what Nabcor wanted, but this was never done, and GM's field management were not advised about Nabcor or similar companies.

On 1/10/68, FM told Karney he wanted a speedy answer, yes or no (E-833-4). On 1/19/68, FM met with Karney in the NY GM Building and Karney said Nabcor's request was still under advisement; FM said he wanted an answer by 1/23/68 because his broker had requested legal assistance. Karney said GM's customary investigation of fleet certificate applicants required a D&B report, among other things, which took time. Olson testified he did not know why he as Director of the Fleet Section required a D&B report on fleet certificate applicants (A-5677). Karney called the Fleet Section at the conclusion of the meeting to relay FM's demand (PX 345, E-59-60). The D&B report was requested or received by GM on 2/2/68 (PX 354, E-66). On 1/23/68, Karney wrote to the Fleet Section enclosing a memo on his 1/19/68 meeting with FM (PX 345, 347; E-59-60, 62).

During the middle of 1/68, Belcher told FM that Detroit had turned down his application and Belcher could not do anything about it (A-3126). On 1/26/68, Olson prepared a letter (for Karney's signature) rejecting Nabcor's request for a fleet certificate, stating Nabcor did not qualify for a fleet certificate and that GM was not in a position to investigate Nabcor's allegations about the events in Buffalo because Nabcor refused to give

sufficient information to Karney and, therefore, that (in GM's opinion) no such activity against Nabcor had occurred (PX 346, 349, 352; E-61, 63-4). Olson admitted he had insufficient information to know whether GM was in fact in such a position of unawareness about the events which were happening to Nabcor, particularly in Buffalo (A-5691-2).

On 1/26/68, Olson sent the form letter to Karney concerning FM's request for a "fleet agreement" (a reference to the old type in which GM fleet purchasers agreed not to buy for resale). The letter was retyped for Karney's signature and mailed to FM on 1/31/68 with a blind copy to Olson (PX 353, E-65).

On 2/7/68, FM sent a letter to Karney with copies to Belcher, the GM President (Cole) and Board Chairman (Roche) explaining that Nabcor only wanted a fleet certificate because Belcher had suggested this as a solution to the problems created for Nabcor by the employees of the Chevrolet Zone in Buffalo, who initiated a boycott of Nabcor by GM dealers in Buffalo (PX 356, E-67). Karney sent a copy to the Fleet Section (PX 357, E-68-9); President Cole received his copy on 2/9/68 and immediately wrote to the Fleet Section claiming Cole "has not seen" the FM letter (PX 362, E-71); Board Chairman Roche received the letter on 2/9/68 and forwarded it to GM's General Counsel, who received it on 2/12/68 (PX 356, E-67).

The Fleet Section wrote to Karney directing him to advise it of any further communications with FM, with copies to Sattler and the GM General Counsel (PX 361, E-70; PX 356, E-67).

H. BELCHER, GMAC AND FLEET FINANCING (12/67-3/68)

About 7 days (A-3096) after FM's conversation with Belcher on 12/15/67, FM met with GMAC's Drury in his New York office (A-3093), after Drury had spoken with Belcher (A-3094). FM told Drury what he had told

Belcher (A-3093-4) and that FM was willing to cooperate in the issuance of a fleet certificate to Nabcor by going into a small rental (A-3096) or leasing operation, if GM or GMAC would finance the cars (A-3094). Drury said the GMAC office in Philadelphia would have to handle it (A-3094), and Drury gave FM the names and telephone numbers of Speece and DiSimone to contact (A-3094-5) and Drury said to have them call him if any problems developed (A-3095).

FM called Speece, of the Philadelphia Chevrolet Zone (A-3096), and told him what FM and Drury had discussed about getting GM-GMAC financing for a small rental or leasing operation (A-3096). Speece said he was familiar with FM's operation and that Nabcor is bootlegging cars and he doesn't know if GM can sell cars to Nabcor for a fleet or lease operation; Speece said he could not approve anything like that (A-3049) and referred FM to DiSimone (A-3096-7).

FM called DiSimone within 1-2 days (A-3097-8) and told DiSimone of FM's discussion with Drury and that Speece said he could not approve the proposed purchase (A-3098). FM said that Speece objected to Nabcor's reselling of cars and referred FM to DiSimone. DiSimone said GM was not in the business of selling cars to people who are going to resell them (A-3098), and that Nabcor wants a leasing company to obtain a fleet certificate so Nabcor can buy cars for resale (A-3098), and DiSimone doesn't know whether he can approve that (A-3098). DiSimone wanted another meeting (A-3050); FM explained the Buffalo problems, the Rohrer cutoff of supply, that Belcher suggested the issuance of a fleet certificate to cure the problem (A-3099) and that another meeting would be useless unless something could be done for Nabcor (A-3099). DiSimone said he would call Drury and get back to FM (A-3099), but he never did (A-3099).

GM had 10-car, 20-car and other financing plans (A-3132, E-778-9)

and FM spoke with Hank Thomas, Philadelphia GMAC manager about acquiring a line of rental cars through one of these GM fleet financing plans (A-3132), in furtherance of FM's communications with Belcher and Drury (A-3132-3). In 2/68, FM set up a meeting with Thomas and Nabcor (A-3135).

Hank Thomas called Nabcor and spoke with AM saying he had an inquiry about a line of credit for rental cars but GMAC only gave this type of financing to its dealers, and Nabcor would have to go through a GM dealer to get the financing or financing approval from GM/GMAC (A-4059-60). Thomas said Nabcor's payback rate on the financing would be 2-1/2% per month (A-4060).

Then, AM discussed with Matt Slap Chevrolet in Philadelphia (A-4060), from whom Nabcor had been buying cars for a year (A-3136, E-802), the purchase of a line of rental cars and their financing through the GMAC plan (A-3131, 4060-1). AM gave to Matt Slap FM's Guarantor Financial Statement, on GM's form, dated 2/14/68, showing FM's net worth of \$759,000 (including the Nabcor stock, valued at \$600,000) (A-4175, PX 390, E-74-5). See DX-CCC, E-970 (in ev. at hearing) for a copy of Matt Slap's letter request of 1/31/68 to Thomas of GMAC.

On 2/26/68, Thomas submitted an application to GMAC/GM in Detroit for 100% financing of 25 Chevrolets for Nabcor, as a line of daily rentals, to be purchased by Nabcor from Matt Slap Chevrolet. Thomas recommended that approval be given by GM/GMAC because of the additional sales potential represented by sales to Nabcor, with the financing charge of 7.25% true, and a 2-1/2% monthly loan repayment amounting to \$1,682. Thomas indicated on the form that the financing rate of 7-1/2% was lower than the limitations of the GM fleet plan (E-778-9), and did not submit information about any FM guaranty. Thomas gave Nabcor a satisfactory credit report, with a # 1 D&B rating. The transaction was consistent with FM's discussions with Belcher and Drury, whose efforts on behalf of Nabcor appear to have been thwarted

by "Detroit".

The application was turned down by GM/GMAC (A-3134) and Nabcor was refused the limited line of credit (A-4061). Accordingly, Nabcor could not buy the cars it needed to qualify for a GM fleet certificate.

I. NABCOR'S CONTINUING PROBLEMS (1969-70)

GM/Queen City Chevrolet Incident: FM placed 1 car and 2 truck orders with Queen City Chevrolet in Cincinnati, Ohio in the spring of 1969 (NIA-537). FM got the car and the less expensive truck (NIA-554, A-3822), but delivery of the expensive El Camino truck was stopped (NIA-537-8, A-3165-7, 3822). Immediately after talking with Queen City's manager, Mr. Bonfield (NIA-537, A-3165-7), FM called Jack Douglas of the New York Zone office of Chevrolet (A-3165). FM told Douglas that Bonfield told FM that Douglas had stopped the truck delivery, and FM asked Douglas why. Jack Douglas recalled speaking with Bonfield and said he (Douglas) checked with the Philadelphia Chevrolet Zone and found out that Nabcor was not an authorized GM dealer and was bootlegging cars (A-3167) and does not have a fleet certificate; and that Nabcor should not be selling cars; and Douglas told Bonfield not to deliver the truck to Nabcor (A-3166-7). Then, FM spoke with Bonfield and obtained the truck (NIA-555), because of the difficulties for a dealer in reselling an expensive El Camino truck (A-3822) of this type, because it would not normally be in the car dealer's inventory (NIA-555-6). Nabcor's records show no other vehicles bought from Queen City Chevrolet.

GM/Kline Pontiac Incident: Kline Pontiac in Doylestown, Pennsylvania ordered cars for Nabcor on a "fleet" basis pursuant to agreement of 8/20/69 (E-315). Starting on 3/10/70 (PX 111-112, E-19-20), a 1/29/70 and 4 other Nabcor cars were held up by the GM Pontiac Zone, because the cars were being sold to Nabcor (PX 110-13, 127; E-17-22) and Nabcor was not on the GM

National Account List, plaintiffs' alleged "whitelist" (which is PX 626-1, E-333-536). One of the cars was even diverted while it was en route to Kline and placed in a GM Zone warehouse without Kline Pontiac's knowledge (E-19, E-21). GM said the cars were not for a qualified fleet account and, therefore, the cars had to come out of Kline Pontiac's retail allotment instead of being reimbursed as a fleet allotment (E-20) as Kline had requested by his marking the orders "fleet" (E-19). The first car was never delivered to Nabcor, probably because of customer cancellation (page 0729 of DX D-9, not in appendix volume). Subsequently, the remaining 4 cars were released to Kline Pontiac and sold to Nabcor after delays of 64 (N order # 789), 77 (N order # 803), 108 (N order # 817) and 70 days (N order # 831). See PX 716 not in exhibit volumes to appendix. Nabcor's Broker on all 5 car orders was A. D. Wilson and he stopped submitting orders to Nabcor 2 months after delivery of the last of the 5 ordered cars (PX 699, E-658).

GM/Cerota Chevrolet Incident: At Moe Cerota's request and knowing Nabcor was a reseller (NIA-557, A-4191-2), Nabcor ordered cars from Cerota. On 11/11/69 (A-3168), Nabcor ordered a Corvette for customer Stolarski, who ordered from a Nabcor franchisee in Detroit (NIA-558, PX 620-2, E-326-328). After 7 months of delay (A-3168), FM talked with Mr. Eoon of GM about the ordered Corvette (A-3168). Later, the car was delivered by GM to Moe Cerota in Elmer, New Jersey, even though the Nabcor customer lived in Detroit. Cerota put title to the car directly in the name of Stolarski (PX-650, E-586), but Nabcor paid for the car (A-4194), which Cerota admitted was irregular (A-4195). Also, Cerota hid title from GM in the same fashion for 2 other purchases by Nabcor (PX-649, E-585; PX-651, E-587).

GM/Marty Motors Cadillac-Oldsmobile Incident: Marty Motors sold Cadillacs and Oldsmobiles to Nabcor, but required that title to Cadillacs be put directly into the name of the Nabcor customer (E-590-1, 600, A-5071) and

at the same time Marty Motors was selling Oldsmobiles directly to Nabcor (E-592-4, A-5095-6). The court below refused to admit PX J-86 (E-777), a 9/2/69 letter to Nabcor from Marty Motors saying "we must register all Nabcor new car orders directly in the customers name"; and the court refused to permit plaintiffs to call its author (Kirsch) when plaintiffs made their request during trial, pushing the matter into the background with various other requests by plaintiffs (A-5066-5071).

J. EVIDENCE AT TRIAL - DAMAGES

1. Start of Unique Business: Nabcor was founded with \$27,000 in capital advanced by FM (E-1292, E-1298), to be more substantially funded by the sale of franchises. The idea was unique. In 7/67, GM's President (Roche) was unaware of any similar company (A-4409); and John Rock of the Fleet Section also believed Nabcor was unique during 8/1/68-7/1/69 (A-5230-1). Nabcor started by setting up its distribution system, selling Nabcor franchises to "automobile brokers", the first sale in 2/66 (E-1240). Nabcor's cash receipts from its 54 franchise sales as of 1/31/67 was \$234,000 (E-981, E-1241-2). Also, Nabcor received \$88,000 in promissory notes from some of the new franchisees (E-980). From 2/66 to 6/66, Nabcor went from none to 50-60 employees, excluding FM and AM; 25 were regular personnel and 15-25 were franchise salespersons (NIA-152, A-2881-2). By 12/66, Nabcor expanded into 3 offices: Yonkers, Jenkintown, Pennsylvania and New York, New York (NIA-110, 112, 115).

2. \$750,000 Value of Nabcor - During 1966, Nabcor was offered \$500,000 for a 2/3rds interest by Ruckle (A-3997), which was then engaged in a similar business selling all makes and models of cars to doctors (A-3322-4, 3328-9). This made Nabcor worth approximately \$750,000 (A-3998) at the time.

3. 160 Car Orders in 4 Months: The first brokers' orders were submitted by Nabcor to GM dealers in 9/66 (NIA-1499). Nabcor charged the broker \$100 over Nabcor's cost and the broker charged an additional \$100, making the retail purchaser pay \$200 over the dealer's cost (A-2874), disregarding holdback adjustments, if any. Nabcor's brokers were successful, and in the first 4 months ending 12/66, Nabcor obtained about 160 orders for all makes and models (E-94-98).

4. Loss of Orders and Income: Specific dealer refusals to deliver and delivery delays discussed earlier are incorporated in this section. As a result of the refusals and customer cancellations (A-3978, PX 714, E-772; PX 715 E-775; A-5615-7), Nabcor delivered only 70 of the 160 ordered cars (PX 450, E-93 et seq.), and lost \$100 per car on the 90 lost orders (A-2874), amounting to \$9,000. (The number of delivered cars - 70 - was calculated by dividing Nabcor's \$100 fee into Nabcor's \$7,000 gross profit on car sales for 1966, Nabcor's 1st year. Nabcor's gross profits on car sales were obtained from E-982, "Automobile Sales" less "Cost of Automobile Sales"). Because of these refusals and delivery delays (A-3978), Nabcor added 2 additional levels of franchised brokers in mid-1967 and reduced its fee from \$100 to \$25, plus a newly-imposed handling charge of \$25 (A-2875, 2879), adding up to a gross profit for Nabcor of \$50 per car (A-5450). The Master Broker kept \$25 (A-2849), the Area Broker kept \$50 (A-2875), and the Broker kept the same \$100 of the total \$225 add-on (A-2875). Nabcor's profit per order decreased by 50% as a result of the activities against Nabcor, and Nabcor's prices to its customers went up by 12-1/2%.

5. Operating at Loss: Car sales income was recurrent income to Nabcor (A-3976), but was insufficient to cover Nabcor's overhead expenses of \$78,000 (excluding commissions, on franchise sales) for the year ending 1/31/67 (E-982); \$118,000 for the year ending in 1968 (E-988, E-1296);

\$105,000 for the year ending in 1969 (E-1296); \$110,000 for the year ending in 1970 (E-1296); and \$96,000 for the year ending in 1971 (E-1296). Only due to non-recurrent franchise income (A-3976-7) Nabcor had a \$20,000 "gross profit" as of 1/31/67 (A-3661). Nabcor never had its car sales business operating profitably. If each of Nabcor's brokers produced the \$6,000 minimum annual gross profit (to mid-1967) or \$3,000 (thereafter) (A-5543-57), Nabcor would have been operating profitably prior to 1/67, at which time Nabcor had 52 brokers (E-1240-1), to cover Nabcor's overhead expense of about \$90,000 to \$100,000 per year during 1966-1970 (E-979, E-983, E-1296).

6. Loss of Brokers: Shortly after dealer refusals and/or dealer delivery delays affecting a given broker, the broker ceased submitting orders to Nabcor (See PX 714, E-772; PX 715, E-775; PX 716-NIA; PX 699, E-658; PX 450, E-93; and DX-T-8 + Supplement, E-1396). The brokers could not function efficiently with substantial delays (A-5617) or cancellations of orders. Each lost broker was a loss to Nabcor amounting to \$6,000 per year (1966 to mid-1967) or \$3,000 per year (thereafter) (A-5543-57), based on sales of only 5 cars per month (A-3986), equal to 1/4th to 1/2 the number of new cars typical new-car salesmen sell in a regular (franchised) dealership (A-3986, 5544-57). Various Nabcor brokers submitted orders equalling or exceeding this rate: Turco in 7/66; Goldfeather, Schultz, Ippolito, SMC and Jones in 9/66; SMC in 10/66; Smith, Schultz and Coastal in 11/66; and Augustine in 12/66 (E-93 et seq.). Nabcor had 50-146 franchisees from 12/66 to 12/70 (E-1240), which would have been increasingly profitable to Nabcor. Also, Nabcor's existing overhead structure was sufficient to cover those increased orders at no extra cost to Nabcor.

7. Curtailment of Operations: Nabcor's financial condition was affected by the dealer refusals and delivery delays (A-5481). During the end of 1966 and early 1967, Nabcor fired all but 3 of its 50-60 employees

(A-2883), and FM and AM remained with Nabcor. Nabcor lost its franchise men (A-5481) and active brokers (A-5481-2, 5492-6, 5527-8). These brokers who were acquired took about 10 hours of Nabcor management time to acquire (A-5488-9, 5491-2), as to each, not counting the number of hours spent with persons who did not become brokers. On 1/31/67, Nabcor had a negative net worth of \$143,765 (A-2844) which on 5/2/67 remained unchanged (A-2843, DX LLL E-979). Dealing with the delivery delays (A-5530) and the refusals to deal by dealers and related broker problems took a substantial amount of Nabcor's management's time and increased Nabcor's costs, which prevented Nabcor from giving its franchisees their benefits under the franchise (A-5535). Delays took telephone conversations both ways and substantial time, limiting Nabcor's ability to function in its regular business (A-5530-5). During 1968 or 1969, it took Nabcor 15-24 months (an average of 1.4 years) to respond to inquiries from prospective franchise purchasers (A-3925-6) because Nabcor had only 3 employees and a poor financial condition (NIA-1581, A-4044-5). Nabcor tried to stay in business (A-4001) hoping that help would come. Government agencies did not stop the problems (NIA-1528-9, A-4001) and in 1973 the court below refused to grant Nabcor's preliminary injunction motion, immediately after the denial of which Nabcor went out of its business (A-4001).

8. Destruction of Business: Nabcor was unable to service its brokers because of the added money and time requirements to cope with the problems caused by the activities of the defendants and co-conspirators. One by one, Nabcor's brokers ceased submitting orders to Nabcor and ceased acting as Nabcor brokers, making them worthless to Nabcor as brokers (A-5481-2, 5492-6, 5527-8). About 12 of Nabcor's franchisees sued (A-5529, E-1293). Nabcor settled with one for \$3,000 (A-5529) and had a judgment against it for \$5,500 in another (E-1293). Nabcor's franchisees owed Nabcor \$250,000 in notes (A-3651-2), which were written off by Nabcor's accountants

prior to Nabcor's public offering in 1972 (A-3653-4, 5547), but most of the brokers sold had ceased doing business or any significant business with Nabcor within a few months after purchase of their respective franchises (DX T-8 and Supplement, E-1396), which plaintiffs claim made the notes valueless in 1/67 or so. This amounted to a destruction of Nabcor's business and injury to Nabcor's property by early 1967, and also caused the losses of the \$27,000 in initial capital of Nabcor; \$750,000 in value of Nabcor; a loss in \$6,000 of value for each broker, amounting to \$312,000 each year of the damage period for the 52 franchisees sold by or before 1/31/67. Also, the fees and notes paid by these franchisees were lost, amounting to a loss of additional capital (non-recurrent income). Nabcor's damages also include claimed right to indemnification by defendants for any liability Nabcor may have to its franchisees, possibly without any applicable statute of limitations because of possible fraud allegations against Nabcor (E-1293, 1446). See Schedule A "How Activities Directed against Nabcor or a Nabcor Franchisee Adversely Affects Nabcor and every other Franchisee" for the obvious ways in which injuries to plaintiffs' businesses have occurred (A-1880-1910).

9. Loss of Future Sales of Cars and Franchises: Nabcor lost the sales of cars it would have made in later years calculated by multiplying the average number of orders per successful broker during 1966 times the number of franchises Nabcor sold. Nabcor lost the franchise sales Nabcor would have had projecting the sales it made of 52 in 1966, and additional franchises in 1967-1970. Each of the brokers would have produced \$3,000 per year to Nabcor without any additional overhead expense (\$6,000 per broker under an alternative valuation approach).

10. Plaintiff-Franchisees: Each of plaintiff-franchisees went out of business, having failed to receive promised benefits under their franchise agreement: A-5697-9; A-5208; A-5208, A-5217; A-5698; A-5093,

A-5101-6; A-5216; including lack of legal support, delays, non-deliveries, and Nabcor's reduced capacity to help them build their businesses. Each of the franchisees lost the capital invested in its business: General (A-4462, 4466, 4555, 4471, 4695-6, 4755); Nabcor East (A-5088); Jamele (A-5697); and Young (A-5211, 5226-7). Nabcor East's principal, Turco (A-5119) and Young (A-5219) went into personal bankruptcy.

FM and AM had to dilute their percentage of Nabcor ownership from 54% to 38% as to FM, and from 21% to 15% as to AM, to permit Nabcor to raise money needed to save the business, if possible (E-1291, 1283).

K. ACTUAL PREJUDICE OF JUDGE GRIESA AND HIS
PRIOR REPRESENTATION OF GM WITHOUT DISCLOSURE
TO PLAINTIFFS; DENIAL OF PLAINTIFFS' MOTIONS
FOR MISTRIAL AND RECUSAL UNDER 28 U.S.C.
§§ 144 (AFFIDAVIT OF BIAS) AND 455

During the the 27th day of the 34-day trial, 11/23/76, FM learned from his attorney (who had just been informed by an attorney associated with Messrs. Davis Polk & Wardwell) that the firm represented GM when Judge Griesa left the firm as a partner and came over as a newly-appointed judge to the Southern District (A-5335-6). (Immediately thereafter, Judge Griesa was assigned this action for all purposes, on or before 10/12/72 (A-1, 19.) Plaintiffs immediately, during trial, asked Judge Griesa if this was true and, upon confirmation, moved orally to have him declare a mistrial and disqualify himself (A-5335), provided by 28 U.S.C. § 455. Judge Griesa said he worked personally on a GM matter, but unrelated to this litigation (A-5335-6). GM's attorneys then stated (and Judge Griesa agreed) that Davis Polk & Wardwell represented the Salary and Bonus Committee (top management) of GM (A-5337) and referred to a "registration statement or other document issued by GMAC (A-5337) not delivered to or seen by plaintiffs' counsel (A-5337, 5601, 5605) which GM's attorneys said they believed should have been produced in this

action (but was not) which indicated that Davis Polk & Wardwell were attorneys for the Sales and Bonus Committee of GM. The record does not appear to contain any such document. Then, Judge Griesa denied the motion, saying that none of his GM representation could possibly have prejudiced him (A-5336). GM's attorneys tried to mislead the court into believing that plaintiffs' counsel had some kind of constructive notice, when in fact he had none, to his knowledge, as stated to the court (A-5335-5337). Also, Judge Griesa said he remembered that the issue had arisen somewhere (A-5336), but not of record or when plaintiffs were present (cf., last pg. of doc. 526 NIA).

On the 29th day of trial, 11/29/76, FM filed an affidavit under 28 U.S.C. § 144 with accompanying certificate of counsel (A-5600 et seq.), describing the above relationship and stating that plaintiffs and counsel were unaware and that no disclosure was ever made by the court or any defendants' counsel; that the Naboor Action is an atypical action which could result in a finding that GM's distribution system is illegal; that Judge Griesa repeatedly called FM a liar and said that this case was a "thin tissue of lies"; that plaintiffs' attorney is either incompetent or wilfully misleading the court; that plaintiffs' witness Bolling was an embezzler (said because the judge's lack of knowledge of industry practices); that Judge Griesa failed to permit plaintiffs to call GM as a witness in a critical part of the case, relating to fleet and retail allotments and delivery delays; that he had vacated numerous discovery requests and prevented plaintiffs from obtaining needed information from GM and the other defendants; had failed to take into account the differing economic abilities of plaintiffs and GM; and that during the trial he had taken over questioning and attempted to, or succeeded in, getting them to change testimony which favored plaintiffs (Dillon, Urso and Strimple). Even after the filing of the affidavit, Judge Griesa refused to declare a mistrial and recuse himself (A-5605), and GM did not produce the alleged GMAC document.

Throughout the trial, Judge Griesa displayed an obvious bias to plaintiffs and their counsel: For example, saying: "I am fast coming to the point where I know what the situation is, and I think we ought to get finished with this hearing today and impanel the jury tomorrow and go forward with the trial" (A-2769); (After an evidentiary hearing in which plaintiffs were not permitted to offer proof about GM's whitelist) "...the proof is overwhelming that these allegations by the plaintiffs ... have been rebutted so virtually dramatically by documents, credible evidence, by evidence so far exceeded in credibility than that of the credibility of the plaintiffs' witnesses, it is dramatic. I'm talking about the credibility and believability of the witnesses you put on and I think that their testimony ... is simply a tissue of lies" (A-2771-2); "I have got to say this: Everytime we have gone into depth on any particular episode the testimony of the witnesses by the plaintiffs has been proved to be just absolutely untrustworthy to a remarkable degree. "I have sat in this court for a little over four years ... and I really have seldom seen witnesses who are so lacking in credibility" (A-2901-2); (referring to FM's hurried representation during a brief unreported session in Judge Griesa's chambers to explain why Naboor needed injunctive relief after the judge said he would not hold any hearing, that FM put \$100,000 into Naboor to try to save it and the court's unwillingness to accept FM's personal guarantees as part of the \$100,000) "This man either has a very fertile imagination or he is a very dishonest individual, and, as far as I am concerned, that is a fact of life here. We have a very unusual situation where there is a great opportunity for abuse of the processes of the court unless something is done" (A-2902); "If I were on the jury it would be devastating to have these explanations come in, devastating to the plaintiffs' case. I guess one piece of strategy for the defense side would be to let Maiorana string himself out, you know, go out on the longest, thinnest, limb they can find,

and then simply cut him off. So far they have succeeded in doing that. That's not just an inflamed term; that's, in fact, what has happened" (A-2903); "...if this ever happened, and I am not sure it ever happened" (A-2982); "I don't think you are" willing to explore everything" (said to plaintiffs' counsel) (A-3417); "We cannot go week after week with the plaintiffs' witnesses testifying with their severe problems of credibility" (A-3418); "I have got to tell you that I think ... the chances are very great that his story about '67 won't hold up" (A-3859); "I think it is virtually tragic to have a long complicated trial over a case that will end of worth ... a few thousand ... It is just really a piece of silliness as far as the court is concerned and everybody else and as far as Mr. Person is concerned, too" (A-3912); "...the damage claims are so appallingly fictitious that I just cannot express to you what I feel about the imposition that you and your attorney are perpetrating on this Court by coming forward with damage claims and other claims which are proving to be more and more fictitious and groundless" (A-3996); "You have the most aggravated credibility. I think you have to watch your step in this case", referring to plaintiffs' counsel (A-4162); "I assume there will be a motion to dismiss at the end of plaintiff's case, right?" MR. KAPLAN: "Yes, sir." (A-4497); "I heard for weeks about 44 orders placed to Colonial Cadillac, absolute bunk Just bunk, and there is no other word for it. We are embroiled in this litigation which is the biggest waste of business I have ever experienced" (A-4510); "I never read (Naboor's) ... pretrial memorandum thoroughly. ... I read some of it...." (A-2902; also, see A-2124)); "Either you don't know the case or else you are intentionally misleading the Court; it is one or the other. I am somewhat inclined to the latter view, and you must stop it" (A-4652); "The only reason they had trouble getting the cars was that they were 'embezzling' the deposit money -- and there is no other word for it -- to hold that from August to November. You

get these witnesses on the stand and you better get them on the stand and have them tell the truth, or there is going to be a lot more trouble than losing this case" (A-4653); he read from the perjury section of the Criminal Code (A-4654) and said "...I must state, Mr. Person, that your witnesses have given me the reason for speaking in the terms I have done, or some of these witnesses. I make no bones about that" (A-4654-5); "false testimony and false statements" (A-4655); "Maybe my memory fails me, but certainly his testimony was another clearcut example of somebody who was committing some surprising tricks under oath in this court" (A-4661); "These witnesses absolutely expand and contract as the sun moves through the sky. I never simply have seen such a totally unreliable group of people" (A-4763); "How much more of a trial does this case require?" (A-4902); "I don't see any reason to have another three weeks of witnesses about matters where there are no damages that anybody can even talk about. It may be that a motion to dismiss the entire case would be granted" (A-4903); "I don't imagine it really happened this way" (A-4932); "I believe it is quite possible that the plaintiffs will fail in their proof on the basic facts" (A-5164); "I have not heard a lick of evidence" (A-5168); "That's very interesting. I'm glad to know this. This is an example of the ever shifting claims and contentions of the plaintiffs' side" (A-5321); "...I assume there will be motions to dismiss" (A-5327); "...I just have a deep distrust based on experience in this case for that kind of evidence" (A-5353); "That is a good story if it holds up, but I heard that kind of thing before" (A-5500); and "... this is a strategy to take care of the inevitable strength of the statistical materials of General Motors" (A-5592).

Although Judge Griesa stated his firm "did some work for General Motors or General Motors directors, or entities connected with General Motors at times" (A-5335), his firm had represented GM in a major automobile anti-

trust case ending in 1953 (A-5601-2) and in 1974 at least in Automobile Dealer Franchise Act (15 U.S.C. § 1222) litigation. See Charles Hinds Chevrolet-Olds-Cadillac, Inc. v. General Motors Corporation, 74 Civ. 2929 (S.D.N.Y., filed 7/9/74). See iii-iv of appendix annexed hereto. Nabcor was trying to represent GM's franchisees herein as a class action (A-1031-82).

Also, during pre-trial proceedings, Judge Griesa permitted GM unlimited discovery while denying plaintiffs any discovery prior to a hearing (A-285-6); denied all but 6 of plaintiffs' 74 document production requests (A-1025-30; doc. 526 NIA); sua sponte vacated plaintiffs' notice of deposition of 29 GM and GMAC officials for depositions of 1/2 day or less (A-1200, 1219, 1231) even though plaintiffs (A-189, 1198, 1615, 1655) and defendants (A-190, 262, 1095, 43) had deposed many persons before and after; vacated all of plaintiffs' 7 sets of interrogatories directed to the 7 types of defendants prior to severances (A-1140-75, 1521, 1647); twice refused plaintiffs' request to turn discovery problems over to a master or magistrate (A-1512, 1540-1); would not order defendants to identify each oral communication they had about Nabcor even though the court was aware it had vacated plaintiffs' notice to depose many of the same officials (A-1573, 2182-2202, 2224-8) or even as to 200 specified GM-GMAC officials, such as Womack, English, Zibold, Sattler, Speece, DiSimone, Roche, Donner and O'Connor (A-2186-96, 2225-8); would not permit plaintiffs alone to serve any interrogatories without first clearing them with the court (A-1648); vacated plaintiffs' interrogatories concerning the recent firing by GM of all of its employees in the New York Zone (A-1775-83); denied plaintiffs' motion to enjoin further solicitation by GM's attorneys of Nabcor's franchisees to have them bring civil and criminal proceedings against Nabcor and GM, to use as evidence against plaintiffs in the forthcoming class-action motion, which Judge Griesa denied without reading (A-1787-93, 1858-9; also, see A-1657-9, 1665, 1669-70, 1696-1705,

1830-34, 1841-57); asked GM to make a motion for costs after the judge read plaintiffs' papers, plaintiffs having filed a notice of appeal (A-1863-5); plaintiffs' subsequent appeal was dismissed because of interlocutory nature, not frivolousness as GM charged (A-1911); refused to allow plaintiffs to take oral depositions on written questions under Rule 31, F.R.Civ.P. (A-1874-5), knowing of plaintiffs' poor financial condition (A-1662); denied all discovery on plaintiffs' § 2 claims (A-1918); refused to order GM to give plaintiffs policy documents concerning GM's warranty program and destination charges (A-1977-8, 2125-6); quashed each of plaintiffs' trial subpoenas (A-2223, 3279, 4650-2); spoke with GM's 4 attorneys before trial in absence of plaintiffs' counsel, after stating his discussion would not relate to this action (last pg. of doc. 881 NIA); and put plaintiffs through financial burdens of 2 trials (including evidentiary hearing on preliminary question) (A-2203) and refused to salvage this extended double trial work by submitting case to the jury (A-5646-51).

This extended pretrial period resulted in plaintiffs' inability to obtain the information from GM needed to prove plaintiffs' claims in other parts of the action, such as the illegality of GM's mandatory destination charges, warranty program and discriminatory pricing policies with the GM fleet rebate, allowed on leases but not sales of cars (A-5739-82).

ARGUMENT

I. GM'S WHITELIST OF APPROVED FLEET CUSTOMERS AND RELATED FLEET ALLOTMENT ARE UNREASONABLE RESTRAINT

The evidence shows that GM does not permit GM dealers to buy part of GM's car production unless the dealers sell to customers approved in advance by GM. These GM-approved customers are required not to resell for at least 6 months. GM denied Nabcor and General approved-customer status. This amounts to an unreasonable restraint in trade, involving customer and market alloca-

tions, territorial exclusives, price fixing at the wholesale and retail levels, and group boycotts.

GM's dealers complete the illegal conspiracy, combination and contract. United States v. General Motors, 384 U.S. 127 (1966) and United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967). Continental T. V., Inc. v. GTE Sylvania, Inc., ___ U.S. ___ (slip opinion, decided June 23, 1977) does not change the result which the court should reach because: (i) a Sylvania issue was whether to permit the defense of reasonableness, but Nabcor required defendants to offer no defense of any kind; (ii) Sylvania involved only non-price vertical restrictions (n. 18 at p. 15), but Nabcor restriction was price (fleet versus retail) and the restrictions were horizontal; (iii) Nabcor had horizontal restriction, illegal per se; Sylvania did not (n. 28, p. 21); (iv) Sylvania's location restriction was not part of a larger scheme to fix prices (n. 9, p. 5); (v) Sylvania was not the dominant manufacturer unlike GM; Sylvania was losing its market position and, at adoption of the change in its distribution system, had only 1-2% of the market (in which the dominant manufacturer had 60% to 70%). Sylvania moved up to a 5% share as a result, jumping up to 8th out of more than 100 companies (p. 1-2; and p. 5 of Justice White's concurring slip opinion); (vi) Sylvania sought to rely on the failing firm doctrine (n. 29, p. 22); GM could not argue such point; (vii) Sylvania unquestionably adopted the franchise plan in question, whereas GM denies it restricts or interferes with sales to Nabcor in any way, so that the actual restrictions imposed by GM are not easily ascertainable, create uncertainty and restrain competition; (viii) the plaintiff in Sylvania was a franchisor of the manufacturer; Nabcor was not a GM franchisee but was a competitor of GM (in retail sales) as were many of GM's dealers in the New York area (competing with the GM Midtown Chevrolet-Pontiac, Cadillac and Circle Buick (E-75, not admitted) Divisions of GM; and other differences.

Also, in Nabcor, GM dealers were selling cars for gross profits 2-6 times as high as Nabcor (A-2867, 3348, 4256-7; E-81), giving GM dealers a margin of protection from interbrand competition (pp.5-6 of concurring opinion).

The Supreme Court in Sylvania reverted to the standards enunciated in The White Motor Co. v. United States, 372 U.S. 253, (1963), which held that, in any price-fixing case, restrictive practices ancillary to the price-fixing scheme are also quite properly restrained. 372 U.S. 260; and White upheld as a per se restraint White's price-fixing violation. 372 U.S. 264.

White, involving a clearly delineated vertical restriction as to territory and customers, held that the applicable rule of law should be designed after a trial. 372 U.S. 261. Clearly, the court below in Nabcor should have required defendants to put on a defense to permit the applicable rule of law to be fashioned as to the whitelist, assuming it was not part of a price-fixing scheme, which would make the whitelist per se illegal.

II. PLAINTIFFS PRESENTED A PRIMA FACIE CASE OF ILLEGAL GROUP BOYCOTT ("BLACKLIST") AND ILLEGAL WHITELIST AS PART OF AN HORIZONTAL AGREEMENT TO ALLOCATE CUSTOMERS AND TERRITORIES AND FIX RETAIL PRICES.

The trial court improperly granted defendants' motions under Rule 50(a), F.R.Civ.P., for a directed verdict. The court failed to "view the evidence in the light most favorable to the non-moving party and ... give that party 'the benefit of all inferences which the evidence fairly supports'". Lebrecht v. Bethlehem Steel Corp., 402 F.2d 585, 589 (2nd Cir. 1968), quoting from Continental Oil Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 692 (1962); and failed to follow Epoch Producing Corp. v. Killiam Shows, Inc., 522 F.2d 737 (2nd Cir. 1975); cert. den. U.S. (197). As to quantum of evidence required, see Jacobson & Co., Inc. v. Armstrong Cork Co., F.2d (2nd Cir. 1977).

Reasonable men could well have found the existence of the alleged conspiracy to prevent Nabcor and its brokers from getting cars and otherwise interfere with Nabcor's franchise system, involving GM's top management and others in GM and GMAC and various GM dealers.

White said that horizontal limitations, such as group boycotts and concerted refusals to deal, are naked restraints of trade with no purpose except stifling of competition. 372 U.S. 263. Plaintiffs have shown there are restraints imposed by GM, including artificial shortages of cars, stoppages and repurchases of cars ordered for Nabcor, extensive delivery delays, threats of franchise cancellation; illegal use of lists of approved customers; refusals to put Nabcor on list; refusal to give credit to GM dealer wishing to sell to Nabcor; warranty restrictions, and evaluation of dealers' performance requiring dealers not to sell outside of their respective areas.

Even if some of the restraints, taken alone, may not be per se violations, defendants should have been required to offer evidence on the reasonableness of the restrictions, such as GM's method of allocating cars, involving artificial shortages and rejections of orders. Why should GM reject orders from its dealers instead of taking and filling, in a strict chronological sequence when possible, all orders by GM dealers as they are given to GM?

III. PLAINTIFFS HAVE A PRIMA FACIE CASE AS TO DAMAGES

Under the foregoing cases, plaintiffs made a substantial prima facie showing of damages, to allow a jury of reasonable persons to find damages in non-speculative and determinable amounts. Plaintiffs lost their original investments, specific car sales, actual and prospective brokers worth \$6,000 each annually, and car sales which had been made by such brokers.

IV. PLAINTIFFS SHOULD HAVE RECEIVED ANSWERS TO THEIR COMMUNICATIONS INTERROGATORIES

At a minimum, plaintiffs should have been able to obtain answers to

some of their "Communications Interrogatories", to identify all communications about Naboor made by 200 identified GM-GMAC officials, who appeared in various documents in this action (A-2186-97).

V. JUDGE GRIESA SHOULD HAVE DECLARED A MISTRIAL AND
RECUSED HIMSELF UNDER 28 U.S.C. §§ 144, 455 UPON
SHOWING OF ACTUAL BIAS AND HIS PRIOR REPRESENTATION
OF GM WITHOUT DISCLOSURE OF THIS TO PLAINTIFFS

Informal Decision 594 of the ABA Ethics Committee (copy annexed) strongly suggests that Judge Griesa should have removed himself. Appearance of a former firm in the 1962 decision should not make a difference in outcome.

It seems clear that Judge Griesa was prejudiced, and even if not, he was required to remove himself upon the filing of the affidavit under 28 U.S.C. § 144, because of the appearance of impropriety otherwise. See Berger v. United States, 255 U.S. 22, 35 (1921); United States v. Hoffa, 245 F.Supp. 772 (E.D. Tenn. S.D. 1965); United States v. Grinnell Corp., 384 U.S. 563, 583 (1966); Whitaker v. McLean, 118 F.2d 596 (D.C. Cir. 1941); dissenting opinion in Mitchell v. United States, 126 F.2d 550 (10th Cir. 1942); and Mitchell v. Sirica, 502 F.2d 377 (D.C. Cir. 1974). Also, see Canon 3C(1) of the Code of Judicial Conduct for United States Judges, which provides: "A judge shall disqualify himself in a proceeding in which his impartiality might reasonably be questioned..."

CONCLUSION

Plaintiffs respectfully request that this Court reverse the judgment in all respects and remand the action for reassignment to a different judge, grant of discovery and other appropriate pre-trial proceedings, and a new trial.

Dated: New York, New York
August 8, 1977

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Attorney for Plaintiffs-Appellants
132 Nassau Street
New York, N.Y. 10038
(212) 349-4616

seeming impropriety might cause a judge to decline to sit in the following classes of cases where his former firm is counsel:

- (a) Where the case was in the firm at the time he was a member, or
- (b) Where a regular client of the firm at the time he was a member is a party to the case; or
- (c) Where a son or other near relative, employed by the firm, had actively participated in the case, either in the trial court or on appeal.

One member of the Committee would omit item (b) from our opinion, and expresses the view that there is no more reason for a judge to recuse himself in such a situation than where a personal friend is involved.

Our Committee also feels that there would be no seeming impropriety or lack of good taste in your sitting in other cases, particularly after the lapse of several years. Your former firm and its clients, just as in the case of other clients, are entitled to the benefit of your judgment on the court on the cases presented, unless there is disqualification or some consideration of the character indicated above which would cause you to decline to sit. In the final analysis it must be left to the good judgment and conscience of the individual judge.

Informal Decision 595
Notice of Lawyer Returning to
Private Practice

October 10, 1962

With your letter of September 14 you request the opinion of this Committee on the following question:

"Is it violative of professional ethics for a lawyer who, on account of another occupation, has ceased the practice of law, but who now, on account of partially retiring from that occupation, desires to re-enter the practice, to send an announcement to the members of the bar of his State, advising them that he has re-entered the practice and has acquired an office for the purpose at a named address?"

Canon 27 of the Canons of Professional Ethics of the Association broadly condemns any form of solicitation or advertisement for professional employment; but approves the "customary use of single professional cards" and the publication of certain data in reputable law lists.

Heretofore our Committee has consistently disapproved the publication by a lawyer or law firm of any kind of notice in newspapers, magazines, or other periodicals, but it has approved as an exception under Canon 27 the sending out by lawyers or law firms of notices of (1) change of name of firm, (2) change of membership of firm, or admission of new partners, (3) change

of office address and service.

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October 25, 1962

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Informal Decision 594
Judge Sitting In Case Where Former
Firm is Counsel

October 22, 1962

With your letter of September 12 you advise that ever since you were elected Associate Justice of the Supreme Court of Arkansas in 1948, it has been your practice not to take part in cases wherein the law firm of which you were a former member appears as counsel, that even though not actually disqualified in such cases; you have felt that the losing lawyer or litigant might not think the Court was wholly unbiased, particularly in a case where the Court was divided and you might cast the deciding vote in favor of your former partner's client. You indicate that you have been considering changing this practice and taking part in all cases, unless you are actually disqualified or have some special reason not to participate; but before doing so you would like to have the opinion of our committee as to whether any question of judicial ethics is involved. The following Canons of Judicial Ethics might appropriately be referred to:

Canon 4. A judge's official conduct should be free from impropriety and the appearance of impropriety; he should avoid infractions of law; and his personal behavior, not only upon the Bench and in the performance of judicial duties, but also in his every day life, should be beyond reproach."

Canon 13. A judge should not act in a controversy where a near relative is a party; he should not suffer his conduct to justify the impression that any person can improperly influence him or unduly enjoy his favor, or that he is affected by the kinship, rank, position or influence of any party or other person."

Canon 26. ... It is desirable that he should, so far as reasonably possible, refrain from all relations which would normally tend to arouse the suspicion that such relations warp or bias his judgment, or prevent his impartial attitude of mind in the administration of his judicial duties."

In Formal Opinion 200 this Committee held that a judge should, when feasible, avoid sitting without colleagues in a case in which a near relative is counsel. In Informal Opinion C-383, involving the same question, we said, in part:

"It would appear from the Judicial Canons quoted above and from the former opinion of this Committee that a judge is not required to recuse himself merely because the firm employing his son was of counsel in a given case. Even where the son is active in the case the Canons do not preclude a judge from sitting in the case, but good taste and the desire to avoid any seeming impropriety dictate that the particular judge not actually participate in the decision in a case where the son had actively participated in the decision in a case, either in the trial court or on appeal."

We give you this background of the Opinions of the Committee so that you will know our approach to these problems.

There is no Canon of Judicial Ethics which would preclude a judge from sitting in a case merely because his former firm is counsel in such case. However, the Committee feels that good taste and a desire to avoid any

74 CIV 2029

15/19774

ATTORNEYS

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GENERAL MOTORS CORPORATION

For defendant:

Davis, William H.
1 Chas. Lindbergh Plaza, NYC 10007, NY 2-35

STATISTICAL RECORD	COSTS	DATE	NAME OR RECEIPT NO.	REC	DGB
J.E. 5 mailed X	Clerk	JUL 1974	11/1/74 7-11-11	15	15
J.S. 6 mailed ✓	Marshal				
Basis of Action: Violation of Automobile Dealer Franchise Act. Breach of Contract & tortious interference. 15 USC, Sec. 1222 1222. \$300,000.	Docket fee				
	Witness fees				
	Depositions				

A-iii

JUDGE TYLER

74 CIV. 2929

DATE	PROCEEDINGS	Date Order Judgment No
Jul 9-74	Filed complaint and issued Summons.	
Jul 12-74	Filed Summons with Marshal's Return .Served General Motors Corp.by John Bachus, on 7/10/74	
Jul 23-74	Filed Pltffs interrogs and request for production of documents(set no.1)	
Jul 25-74	Files stip & order that the time for the deft. CHAS.HINDS CHEVROLET-OLDS-CADILLAC,INC. General Motors Corp to ans the complaint is entended from 7-3074 to 9-19-74	
Aug.19-74	Filed Stip & Order extending time for Deft. to answer pltffs'interrogs&request for production of documents Set.No.1 to 9/19/74. So Ordered.Tyler, J	
Sep.12-74	Filed Stip Order extending time for Deft. General Motors Corp. to answer to Pltffs' interrogs. and request for Production of documents(Set No.1)to 10/1/74.	
Oct.23-74	Filed Stip Order extending time for Deft. General Motors Corp. to answer complain to 10/22/74; " " " " " " " " to Pltffs' interrogs. Request for Production of documents, Set No.1 to 10/26/74	
Oct.29-74	Filed Affidavit of Dep. in support of motion to transfer action.	
Oct.29-74	Filed Affidavit of Deft.	DP-74
Nov. 6-74	Filed Stip&Order for an order transferring action to USDC,ND,NY is adjourned to 12/6/74.Tyler, J.	
Nov.19-74	Filed Pltffs Proposed Amended complaint(annexed) and Notice of Motion for an Order granting leave to file and serve an amended complaint in form of complaint ret.12/6/74.	
Nov.20-74	Filed Stip&Order that documents 148-377 produced by deft in response to pltffs' interrogs and Request for Production of Documents,Set.No.1 shall be used solely for purposes of preparation for use in trial,etc.Tyler, J.	
Nov.27-74	Filed Affidvt by Dale A.Schreiber for pltff in opposition to motion to transfer action.	
Nov.27-74	Filed Pltffs'memorandum in opposition to deft's transfer motion.	
Dec.1-74	Filed Deft's reply affidvt in support of motion to transfer action.	
Dec.4-74	Filed " Reply Memorandum in support of motion to transfer action.	
Dec. 9-74	Filed Stip&Order extending time for deft. to answer Amended Complaint to including date 30 days after final determination of deft's motion to transfer present action to USDC,ND,NY.Tyler, J.	
Dec.9-74	Filed Memo End.on Motion of 11/19/74.Motion for leave to amend complaint is granted upon condition that amended pleading be filed no later than 12/16/74. So Ordered.Tyler, J.(mn)	
Dec.9-74	Filed Memo End.of motion of 10/29/74.Motion to transfer this cause to ND,NY is granted.Despite adroit and ingenious complications of statistics and arguments by pltffs'counsel,this case had its inception in the transferee district, and it is still solidly implanted in that district. Save for the convenience of pltffs'counsel,there is no discernible tie to this district of any consequence. The clerk is directed to transfer the file to Clerk of ND of New York without undue delay. So Ordered.Tyler, J.(mn)	
Dec.9-74	Filed Order appointing process server -Charles W.Shay of summons and complaint.Clk.	
Oct.29-74	Filed Deft's Affidvt&Notice of Motion to transfer action ret.11/8/74.	
Dec.9-74	Filed Stip&Order extending time for deft Parklane Hosiery Co.Inc. to answer complaint to 1/13/75;extending time for defts Herbert N.Somokh,Denise D.Somokh, Herbert N.Somokh,etc. to answer complaint to 1/13/75;extending time for deft. David M.David to answer complaint to 1/13/75.Tyler, J.	
Dec.9-74	Filed Memo End.on Motion for substitution of attys of 12/3/74.Motion disposed of as follows:(1)Qwent Smith,Esq.is permitted to withdraw as counsel for pltffs; (2)Pltffs have until 1/3/75 to advise court and defense counsel when if any one,they have retained as counsel. So Ordered.Tyler, J.(mn)	
**Oct.29-74	Filed Deft's Answers and object: A-iv rogs(set No.1)	
***Dec.3-74	Filed Pltffs' Affidvt&Notice of nstitution of attys.	
Dec.10-74	Mailed certified copy of Docket End.on motion to trf to USDC,ND,NY with complete file, also letter for acknowledgment of same.	
Dec.16-74	Acknowledge receipt of file ,docket&memo end.on motion(certified)filed stamped 1/13/75	

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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NATIONAL AUTO BROKERS CORP., et al., : 77-7037
Plaintiffs-Appellants, : SDNY 70 Civ. 5421A (TPG)
-against- :
GENERAL MOTORS CORPORATION, et al. :
Defendants-Appellees. :
----- x

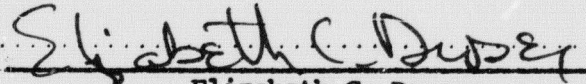
STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

Elizabeth C. Droser , being duly sworn, deposes and says:

That on the 8th day of August, , 1977, affiant served
a copy of the annexed and foregoing

Brief for Plaintiffs-Appellants dated August 8, 1977

(hereinafter, the "Document") on all Defendants' attorneys named in the list
of attorneys attached hereto, by depositing a copy of the Document in a securely-
wrapped envelope, with first-class (or priority) postage pre-paid, addressed
as set forth on said list, the last-known address of each of said attorneys,
respectively, in the United States Post Office Box maintained by the United
States Postal Service at Beekman Street and Nassau Street, in the City,
County and State of New York.


Elizabeth C. Droser

Subscribed and sworn to before me
this 8th day of August , 1977.


Notary Public

CARL E. PERSON
Notary Public, State of New York
No. 31-3068710
Qualified in New York County
Commission Expires March 30, 1979

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